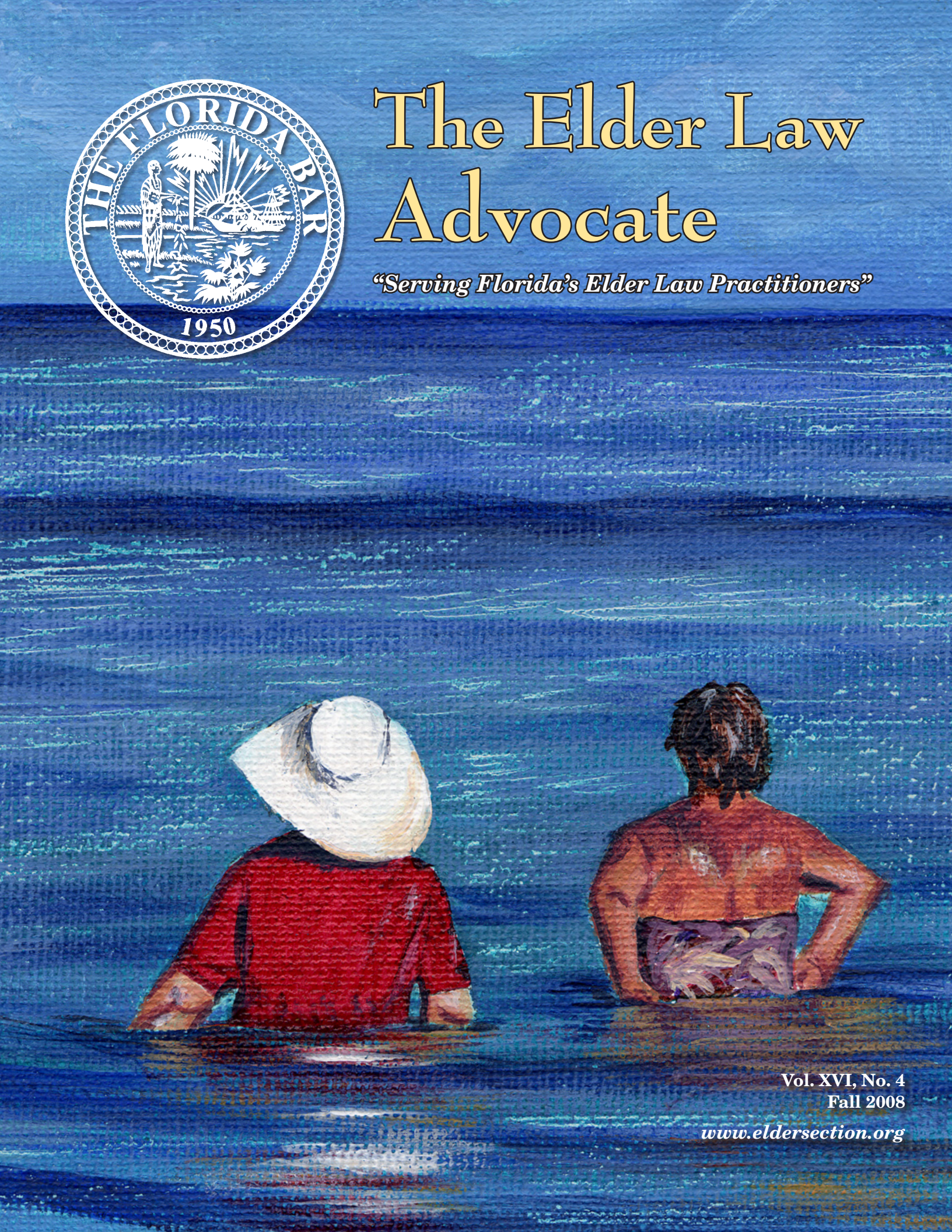
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



Vol. XVI, No. 4
Fall 2008
www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

Linda R. Chamberlain, Clearwater
Chair

Babette Bach, Sarasota
Chair-elect

Leonard C. Mondschein, Miami
Administrative Law Division Chair

Enrique Zamora, Coconut Grove
Substantive Law Division Chair

Twyla L. Sketchley, Tallahassee
Secretary

Jana McConnaughhay, Tallahassee
Treasurer

Patricia I. "Tish" Taylor, Stuart
Editor

Susan Trainor, Tallahassee
Copy Editor

Arlee J. Colman, Tallahassee
Section Administrator

Lynn M. Brady, Tallahassee
Layout

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the section.

The Elder Law Advocate will be glad to run corrections the issue following the error.

The deadline for the WINTER ISSUE is January 15, 2009. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Patricia I. "Tish" Taylor, Esquire, *pit@mcsumm.com*, or call Arlee Colman at 1-800-342-8060, ext. 5625, for additional information.

CONTENTS:

COVER ART: The cover art was taken from a painting by the Section's Program Administrator, Arlee Colman. See more of Arlee's work at www.artbyarlee.com.

It takes a village, We are a village ...

Linda R. Chamberlain

Message from the chair

It is exciting to announce that this year the Elder Law Section has exceeded a 1,500 membership count. This remarkable figure is one small stepping stone toward our continued success. Our organization is now larger than many towns/villages in Florida: Mayo, Cedar Key, Crescent Beach and Greenville, to name just a few. With our ever increasing numbers and active membership, we are changing lives, making a difference and promising to maintain our steadfast progress.

Our mission statement provides that the Elder Law Section exists to

(a) Cultivate and promote professionalism, expertise and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs;

(b) Advocate on behalf of its members; and

(c) Perform such other activities as may be necessary and appropriate to fulfill this mission statement.

This year's Executive Committee and Executive Council have taken the mission to heart. We are committed to providing excellent continuing education seminars, and will be implementing a specific coursework mentoring program for attorneys new to elder law. Please check the schedule in *The Advocate* and watch the website, *www.eldersection.org*, for future educational opportunities. The Certification Review Course in January will provide a comprehensive review of the core legal areas determined to be needed by the elder law practitioner. You will not want to miss it.

The Advocate took a huge growth spurt last year, and we are continuing this growth with featured articles as well as regular columns. Thank you, Tish Taylor, for putting together a great newsletter; we appreciate all of your hard work. Many of our members have taken the time to share valuable information and have submitted articles; thank you for your contributions. I encourage each of you to consider your areas of strength, write an article for *The Advocate* and share the information with your fellow members.

All committee meetings are now providing CLE units, and these meetings give you the opportunity to interact with a small group focused on specific areas of elder law issues. The committee meetings are conducive to the sharing of knowledge, practice tips and informal case discussion. Many of the committees will be working on proposed legislation as well as providing the research and expertise for the section to oppose proposed legislation. I encourage you to take the time and join a committee; a complete list of all of our active committees and the chairs are listed on our website as well as in this newsletter. The ROI will be in your favor.

This year promises to be an active legislative year. This is where "our village" must join together and make the difference. No matter what your political affiliation, please make the following a priority for fall:

- Encourage everyone you meet to vote, and provide voter registration forms in your office.
- Educate every client you meet, every friend you talk with, every acquaintance you make regarding the cuts in services, how they will impact our clients and the costs involved with those cuts. Include in your discussions the judiciary and the budget cuts that have been suffered, the increase in court fees as well as the diminished accessibility to the courts.
- Make an effort to meet with all of your current area legislative representatives and candidates and offer them access to your knowledge regarding issues affecting the elderly and the disabled. Encourage them to call you before they vote on any issue they may not understand.

Since the birth of the Elder Law Section in 1991, we have been a dynamic advocacy-oriented organization always eager to lend a hand. The knowledge and service we have provided over the years have improved many lives. Our history includes diverse, committed, strong leaders that have elevated our section to a new level of achievement. We are always striving to be an ever more cohesive unit with increased organization, and last year's chair, Emma Hemness, contributed greatly to this cause. I would like to take this opportunity to say a heartfelt thank you on the section's behalf. We appreciate all of Emma's time and efforts!

I am grateful and honored to have the opportunity to serve as chair and to work with an exceptional Executive Committee and Executive Council. The personal relationships I have developed over the years through the Elder Law Section are irreplaceable and provide camaraderie that is difficult to find. As we start this new year, I challenge each of you to renew your commitment to the Elder Law Section, attend our council and committee meetings and continuing education classes, volunteer to be a resource to your local representatives and be an active member of "our village."

The new guardian advocacy

by Twyla Sketchley

On July 1, 2008, substantial changes to Section 393.12, Florida Statutes, took effect. These changes redefine the circumstances under which a guardian advocate can be appointed for a person with a developmental disability, add a process by which advance directives can be recognized, exempt certain guardian advocates from the requirement of having an attorney and provide for the restoration of rights. On July 10, 2008, the Florida Supreme Court approved amendments to the Florida Probate Rules to accommodate the new changes to Section 393 (*See In Re*: Amendments to the Florida Probate Rules, 2008 Fla. LEXIS 1242 (Fla. July 10, 2008)).

A guardian advocate can be appointed for a person with a developmental disability (PWDD), as defined in Section 393.063(9), Florida Statutes (2008). Any adult Florida resident, including the PWDD, can petition to have a guardian advocate appointed so long as the PWDD lacks "decision-making ability" to do some but not all of the "decision-making tasks" to care for his or her person or property (Fla. Stat. § 393.12(2)(a) (2008)). Prior to the changes, the statute required the PWDD to "lack capacity" to do some but not all of the tasks necessary to care for his or her property, making the proceeding a determination of capacity, which should be made pursuant to Florida Statutes Chapter 744, instead of a determination of ability.

Few changes were made to the petition requirements. However, the petition must now specifically state the relationship of the proposed guardian advocate to any healthcare, residential or other service provider for the PWDD (Fla. Stat. § 393.12(3) (2008); Fla. Prob. R. 5.649(a) (2008)).

The number of individuals entitled to notice of a Section 393 proceeding has grown. Notice must now be served on the PWDD (verbally and in writing), the next-of-kin of the PWDD, any healthcare surrogate and any agent under a durable power of attorney (Fla. Stat. § 393.12(4)(a) (2008); Fla. Prob. R. 5.649(b) (2008)).

The court must now appoint an attorney to represent the PWDD within three days after the petition to appoint a guardian advocate is filed (Fla. Stat. 393.12(5) (2008)). The court must appoint an attorney from the registry compiled pursuant to Section 27.40, (Florida Statutes. Fla. Stat. 393.12(5)(a) (2008)). This process of appointment of attorneys tracks the procedure for appointment under Florida Guardianship Law, Chapter 744. The court-appointed attorney for a PWDD must meet certain education or experience requirements before he or she is allowed to serve as the court-appointed attorney, which is also required for court-appointed attorneys for an alleged incapacitated person in Chapter 744 guardianship (Fla. Stat. § 393.12(5)(a) (2008)). If the PWDD wishes, he or she may substitute his or her own attorney (Fla. Stat. § 393.12(5) (2008)). The education and experience requirements do not apply to the attorney chosen by the PWDD as a substitute for court-appointed counsel. Previously, the appointment of counsel was only required if an attorney did not file an appearance within 10 working days of the hearing (Fla. Stat. § 393.12(2)(d) (2007)).

The Florida Probate Rules and the Florida Evidence Code apply to all guardian advocacy proceedings (Fla. Stat. §§ 393.12(1)(b), (6)(e) (2008)). Previously, the Florida Rules of Civil Procedure applied (Fla. Stat. § 393.12(2)(a) (2007)).

The statutory changes now recognize that a PWDD may have an advance directive or a durable power of attorney in place prior to the filing of a guardian advocacy proceeding. The court must determine whether a PWDD executed a valid advance directive and whether it sufficiently addresses the needs of the person for whom the guardian advocate is sought (Fla. Stat. § 393.12(7) (2008); Fla. Prob. R. 5.649(d)(3) (2008)). If these documents sufficiently address the needs of the PWDD, the court cannot appoint a guardian advocate (Fla. Stat. § 393.12(7)(a) (2008)). However, as under Florida Guardianship Law, any interested person can contest the validity of an advance directive or a durable power of attorney by filing a verified statement stating a factual basis for the belief that the advance directive or the durable power of attorney is invalid or fails to sufficiently address the needs of the PWDD (Fla. Stat. § 393.12(7)(b) (2008)). The court, in its order appointing a guardian advocate, must state what authority a healthcare surrogate or attorney-in-fact has upon the appointment of a guardian advocate (Fla. Stat. § 393.12(7) (2008)).

Another addition to the guardian advocacy proceeding is the process for restoring the PWDD's rights, similar to the process for restoration of rights provided to wards under Florida Guardianship Law (Fla. Stat. § 393.12(12) (2008); Fla. Prob. R. 5.681 (2008)). Any interested person, including the PWDD, can file a Suggestion of Restoration of Rights. The suggestion must state the PWDD is capable of exercising some or all of the rights delegated to the guardian advocate and provide evidentiary support for that assertion. The evidentiary support can include a signed statement from a healthcare professional from whom the PWDD is receiving services or has been evaluated. If the petitioner is unable to obtain evidentiary support, the petitioner can state a good faith basis for the belief in the Suggestion of Restoration of Rights. The court must appoint an attorney for the PWDD when a suggestion is filed (Fla. Stat. § 393.12(12)(a) (2008)). The notice of filing of Suggestion of Restoration of Rights must be served on the PWDD as well as on the guardian advocate (Fla. Stat. 393.12(12)(b) (2008)). Objections must be filed within 20 days after service of the Notice (Fla. Stat. § 393.12(12)(c) (2008)). Depending on the evidence and objections, a hearing is held (Fla. Stat. § 393.12(12) (2008)). As under Florida Guardianship Law, if some but not all rights are restored,

the Letters of Guardian Advocacy are amended and a new plan must be filed (Fla. Stat. § 393.12(12)(g) (2008)).

Finally, the changes now allow a guardian advocate to be unrepresented by legal counsel so long as the guardian advocate is not delegated property rights other than the right to be representative payee for any government benefits (Fla. Stat. § 393.12(2)(b) (2008); Fla. Prob. R. 5.030(a) (2008)). This does not relieve the guardian advocate from the requirement to file an annual plan if he or she has been delegated personal rights. It also may require the guardian advocate to provide proof that he or she is the representative payee for any government benefits so that no accounting is required (Fla. Stat. § 393.12(10) (2008)).

For a complete review of the changes to guardian advocacy, read Fla. Stat. 393.12 (2008), now updated at *www.leg.state.fl.us/statutes,* and the new probate rules available on the Florida Supreme Court's website.

Twyla Sketchley *is the managing attorney of The Sketchley Law Firm PA in Tallahassee. Among many things, she is secretary of the Elder Law Section.*

Lawyers earn board certification in elder law, and wills, trusts and estates

The Florida Bar recently approved board certification for 207 lawyers in 22 specialty areas of legal practice. Board certification evaluates attorneys' special knowledge, skills and proficiency in various areas of law and professionalism and ethics in practice.

Certified attorneys are the only Florida lawyers allowed to identify or advertise themselves as specialists or experts. The following lawyers earned board certification in the elder law, and the wills, trusts and estates specialties:

Elder Law

- Janet Adams Carver, Fernandina Beach
- Jacqueline Schneider, North Miami Beach
- Mary F. Trotter, The Villages

Wills, Trusts and Estates

- Mark R. Brown, West Palm Beach
- C. Kelley Corbridge, Venice
- Amy J. Fanzlaw, Boca Raton
- Michael Scott Gross, Naples
- Eric Gurgold, Fort Myers
- Michael B. Hill, Fort Myers
- Margaret R. Hoyt, Oviedo
- E. John Lopez, Sarasota
- Susan Michelle Ossi, Gainesville
- Bradley G. Rigor, Naples
- Shawn Christopher Snyder, Davie

"Florida's board certification program is one of the leaders in the nation in maintaining the highest standards for excellence and professionalism while adding practice areas for greater public access to legal specialists," says Florida Bar President John G. "Jay" White III. "The program is predicated on experience and integrity, the foundations that are inseparable from our work as lawyers to advance the administration of justice."

Certification is the highest level of evaluation by The Florida Bar of the competency and experience of attorneys in areas of law approved for certification by the Supreme Court of Florida. Florida offers 22 specialty areas of practice for which board certification is available, the greatest number of state-approved certification areas in the nation.

A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed by the state's Supreme Court may become board certified in one or more of the 22 certification fields. Approximately 4,200 of Florida's 80,000 lawyers are board certified. Minimum requirements for certification are listed below; each area of certification may contain higher or additional standards.

- A minimum of five years in law practice
- Substantial involvement in the field of law for which certification is sought
- A passing grade on the examination
- Satisfactory peer review assessment of competence in the specialty field as well as character, ethics and professionalism in the practice of law
- Satisfaction of the certification area's continuing legal education requirements

Board certification is valid for five years. The attorney during that time must continue to practice law and attend Florida Bar-approved continuing legal education courses. Recertification requirements are similar to those for initial certification. Not all qualified lawyers are certified, but those who are board certified have taken the extra steps to have their competence and experience evaluated.

Applications for elder law certification must be filed by August 31 for the next year's exam, which is held in March. Applications for wills, trusts and estates certification must be filed by Oct. 31, 2008, for the May 15, 2009, exam. For more information, please visit The Florida Bar's website at *www.floridabar.org/certification* or call The Florida Bar's Legal Specialization & Education Department at 850/561-5842.

The appropriate use of F.S. Chapter 415:

Whether Chapter 415, the Adult Protective Services Act, was intended to provide a private cause of action against persons conducting commercial transactions with 'vulnerable adults'

by Lawrence Scott Kibler

The committee members of the Elder Abuse, Neglect & Exploitation Committee of the Elder Law Section welcome the opportunity to engage in a dialogue about the appropriate use of F.S. Chapter 415 to address the exploitation of vulnerable adults in a civil action and will respond with submission of a follow-up article for the next issue of The Advocate.

A civil claim under Chapter 415 is one I frequently encounter as a judicial staff attorney. The plaintiff alleges that he is a "vulnerable adult" as a result of impairment from "infirmities of aging," and was "exploited" by the defendant annuity salesman. The claim contends that the defendant was a fiduciary who placed himself in a position of trust and confidence with the plaintiff, then misrepresented an imprudent insurance annuity product in order to collect an excessive sales commission using high-pressure sales tactics, undue influence and overreaching that targeted the vulnerable senior. Additionally, the plaintiff will provide the deposition of a medical expert who will testify regarding the plaintiff's ongoing cognitive impairment and severe depression that made him vulnerable to the defendant's tactics.

In response, the defendant will assert that the Adult Protective Services Act does not apply to ordinary consumer transactions and that the plaintiff is not a "vulnerable adult" or was not "exploited" within the meaning of the act.

The first question is whether Chapter 415 provides a private cause of action without a "confirmed report" of abuse, neglect or exploitation via mandatory reporting and protective investigations as suggested by the act's statement of legislative intent. A good argument can be made that plaintiffs cannot simply declare themselves to be "vulnerable adults" who were "exploited" within the meaning of the act. In fact, before Section 415.1111 was amended in 2000, a "confirmed report" was required. In its current form, Section 415.1111 provides that a "vulnerable adult who has been ... exploited *as specified in this chapter* has a cause of action against any perpetrator." It could be argued that "*as specified in this chapter*" still refers to the Legislature's express intent for mandatory reporting and use of social services and criminal investigations to protect the elderly. Further, it could be argued that the civil remedies provided by Section 415.1111, which "*are in addition to and cumulative with*" other legal remedies, means *in addition to and cumulative with* mandatory reporting requirements, protective investigations and criminal prosecutions. Unfortunately, there is no authoritative Florida caselaw that construes Section 415.1111 on this issue.

On the other side, plaintiffs will correctly argue that the Legislature clearly signaled its intent for the new statute to have a different meaning from the old statute when it removed all references requiring "confirmed reports." Additionally, the plain language of the statute provides for recovery of attorney's fees and costs as an incentive for plaintiffs' attorneys. Thus, it appears that Section 415.1111 does provide a private cause of action for "exploitation" of a "vulnerable adult" without a confirmed

Kudos Korner

The following members of the Elder Law Section deserve special recognition for their EXTRAordinary efforts and advocacy on behalf of the section, its members or our clients during the past few months.

- Len Mondschein
- Kara Evans
- Howie Krooks
- Carolyn Sawyer
- Emma Hemness
- Charlie Robinson
- Ellen Morris
- Twyla Sketchley
- Patricia "Tish" Taylor

Kenneth S. Rubin, Esq., *was the special guest on Spotlight on Seniors, the Aging & Disability Resource Center's weekly television program with host Edith Lederberg, executive director of the Aging & Disability Resource Center. Rubin's show was titled "Elder Law—Serving Seniors' Needs" and aired on Comcast Cable's local public access Channel 12. The episode is available on the ADRC website (www.adrcbroward.org) under the Television tab.*

report. However, in light of the First District Court of Appeal's recent decision in *Bohannon v. Shands Teaching Hospital and Clinics Inc.*, 983 So.2d 717 (Fla. 1st DCA 2008), the better question is whether Chapter 415 extends claims of "exploitation" to ordinary consumer transactions such as the sale of financial products.

In *Bohannon*, a family sued for damages under Chapter 415 when a family member died after suffering complications in the hospital following surgery. The family alleged that the deceased was a "vulnerable adult" and that the hospital was a "facility" that acted as a "caretaker" whose conduct constituted "abuse" as defined by Section 415.102. The District Court affirmed the trial court's decision that the complaint essentially set forth allegations of medical negligence and held that Chapter 415 was not intended by the Florida Legislature to provide an alternate cause of action for medical negligence pursuant to Chapter 766.

Likewise, one could argue that claims involving the sale of financial products are essentially claims for fraudulent securities transactions and that Chapter 415 was not intended by the Florida Legislature to provide an alternate cause of action for fraudulent securities transactions pursuant to Chapter 517. While Chapter 415 may provide more lucrative recoveries and attorney's fees than Chapter 517, it is not clear whether Chapter 415 was intended to extend to ordinary consumer transactions. Moreover, whether an insurance agent selling a financial product is a "fiduciary" is highly debatable as a question of fact or law. Chapter 415 expansively defines "exploitation" to include "breaches of fiduciary relationships" and implies that those who could form a fiduciary relationship with a vulnerable adult are essentially unlimited. These definitions are extremely broad and could ensnare practically anyone who conducts a commercial transaction with an elderly person. While one could conceive of scenarios where sellers of financial products might "exploit" a "vulnerable adult," certainly the Legislature did not intend to allow senior citizens to sue every time they unwisely purchase a consumer product. The First District Court of Appeal's recent decision in *Bohannon* seems to assert some limit to the reach of Chapter 415. The definitions of "exploitation" and "fiduciary relationship" are so broad that some limitation is warranted. This issue is ripe for appellate review.

Lawrence Scott Kibler *is a retired 20-year U.S. Navy veteran and is a trial court staff attorney in Citrus County, Fla.*

Elder Law Section 2009 calendar

Elder Law Certification Review Course
January 8-9, 2009, 8:30 a.m. – 4:30 p.m. (both full days)
Caribe Royale, Orlando
8101 World Center Drive, Orlando, FL 32821
407/238-8036

Member Reception
January 8, 2009, 4:30 p.m. – 5:30 p.m.

Elder Law Executive Council Meeting
January 8, 2009, 5:30 p.m. – 7:30 p.m.

Winter Issue *ELS Advocate* Article Deadline: January 15, 2009

Elder Law Committee Meetings
Thursday, March 19, 2009, 4 p.m. – 6 p.m.
Renaissance International Plaza
4200 W. Columbus Drive, Tampa, FL 33607
813/877-9200

Public Benefits
Friday, March 20, 2009, 8:30 a.m. – 4:30 p.m.
Renaissance International Plaza

Member Reception
Friday, March 20, 2009, 4:30 p.m. – 5:30 p.m.
Renaissance International Plaza

Elder Law Executive Council Meeting
Friday, March 20, 2009, 5:30 p.m. – 7:30 p.m. (dinner included)
Renaissance International Plaza

Fundamentals of Elder Law II
Saturday, March 21, 2009, 8:30 a.m. – 4:30 p.m.
Renaissance International Plaza

Spring Issue *ELS Advocate* Article Deadline: May 15, 2009

Annual Florida Bar Convention
June 24 . 27, 2009
Orlando World Center Marriott, Orlando

Committees keep you current on practice issues

Join one (or more) today!

Monitoring new developments in the practice of elder law is one of the section's primary functions. The section communicates these developments through the newsletter and roundtable discussions, which generally are held prior to board meetings. Each committee makes a presentation at these roundtable discussions, and members then join in an informal discussion of practice tips and concerns.

All section members are invited to join one or more committees. Committee membership varies from experienced practitioners to novices. There is no limitation on membership, and members can join simply by contacting the committee chair or the section chair. Be sure to check the section's website at *www.eldersection.org* for continued updates and developments.

SUBSTANTIVE COMMITTEES

Exploitation & Abuse
Carolyn H. Sawyer, Orlando
407/354-0888
chsawyer1@aol.com

Erika Dine, Sarasota
941/365-2304
edine@boyerjackson.com

Estate Planning & Advance Directives
Stephen Kotler, Naples
239/435-1533
skotler@wga-law.com

Marjorie Wolasky, Miami
305/670-7005
mwolasky@wolasky.com

Creditors' Rights, Subcommittee of Estate Planning
Kara Evans, Tampa
813/926-6517
evanskeene@aol.com

Guardianship
Beth Prather, Ft. Myers
239/939-4888
bethp@osterhoutmckinney.com

Carolyn Landon, West Palm Beach
561/805-9800
c-landon@att.net

Ethics
Steven Lee Rachin, Tallahassee
850/386-8833
stevenrachinpa@earthlink.net

Legislative
Ellen S. Morris, Boca Raton
561/750-4069
emorris@elderlawassociates.com

Death Care Industry
Philip M. Weinstein, Tamarac
954/899-1551
pmweinstein@msn.com

Medicaid & Government Benefits
Robert Morgan, Jacksonville
904/268-7227
rmorgan@flfirm.com

John S. Clardy III, Crystal River
352/795-2946
clardy@tampabay.rr.com

Power of Attorney, Subcommittee of Medicaid
Robert Morgan

Special Needs Trust
Alice Reiter Feld, Tamarac
954/726-6602
reiterfeld@aol.com

David J. Lillesand, Miami
305/670-6999
lillesand@bellsouth.net

Membership
Travis Finchum, Clearwater
727/443-7898
travis@khsfllp.com

Unlicensed Practice of Law
April Hill, St. Petersburg
727/343-8959
adh@hilllawgroup.com

ADMINISTRATIVE COMMITTEES

CLE
Jacqueline Schneider, N. Miami Beach
305/919-7730
floridaelderlaw@bellsouth.net

Newsletter
Patricia Taylor, Stuart
772/286-1700
pit@mcsumm.com

Susan Trainor, Editor
850/878-7760
editor@ctf.nu

Mentor
Angela Warren, Pensacola
850/434-7122
awarren@mcelderlaw.com

Carolyn H. Sawyer, Orlando
407/354-0888
chsawyer1@aol.com

Council of Sections Representative
Babette Bach, Sarasota
941/906-1231
babette@sarasotaelderlaw.com

ELS Certification Representative
Beth Prather, Ft. Myers
239/939-4888
bethp@osterhoutmckinney.com

Law School Liaison
Jason White, Tallahassee
850/784-2599
jwhite@mcconnaughhay.com

Website
"Rep" Deloach, Seminole
727/443-7898
rdeloach@dhstc.com

David J. Lillesand, Miami
305/670-6999
lillesand@bellsouth.net

LIAISONS

AFELA
Victoria Heuler, Tallahassee
850/425-8182
victoria@mcconnaughhay.com

FSGA
Joan Nelson Hook, New Port Richey
727/842-1001
jnh@elderlawcenter.com

RPPTL
Charles F. Robinson, Clearwater
727/441-4516
charlier@charlie-robinson.com

Marjorie Wolasky, Miami
305/670-7005
mwolasky@wolasky.com

NAELA
Howard Krooks, Boca Raton
561/750-3850
hkrooks@elderlawassociates.com

BOG
Laird A. Lile, Naples
239/649-7778
llile@lairdalile.com

Estate Planning Committee

A. Stephen Kotler, chair

The Estate Planning Committee last met at the Elder Law Section Retreat on July 18. We discussed the proposal by the RPPTL Ad Hoc Committee on Creditors' Rights to Non-Probate Assets and several trust drafting issues. The trust drafting issues primarily focused on third party SNT's and use of triggers and how the new decanting statute could provide flexibility.

Our agenda is still currently focused on three main categories, and subcommittees have been formed to tackle the issues in each area: Subcommittee on Creditors' Rights, whose focus is to develop an ELS response to the RPPTL Ad Hoc Committee on Creditors' Rights to Non-Probate Assets; Power of Attorney Subcommittee, whose focus is to advocate the ELS's perspective to the RPPTL Power of Attorney Committee; and Trust Planning Subcommittee, whose focus is to explore uses of trusts in long-term care planning in the post-DRA environment.

The Creditors' Rights Subcommittee is chaired by Kara Evans. The subcommittee met by phone conference on Sept. 8, 2008, to discuss the ELS's written response to the proposed legislation that is still being drafted by the RPPTL Section. Kara Evans and John Clardy are heading the ELS's response. The ELS was represented by Steve Kotler and Marjorie Wolasky at the RPPTL Ad Hoc Committee on Creditors' Rights to Non-Probate Assets meeting in Palm Beach on July 25. The last meeting of the RPPTL Ad Hoc Committee was in Key Biscayne on Sept. 19. Again, Steve Kotler and Marjorie Wolasky were present as well as Charlie Robinson.

A very close vote of the RPPTL Ad Hoc Committee resulted in a sea change in the committee's direction with regard to the personal representative's duty to investigate and go after non-probate assets. The majority did not want the PR to have a duty to investigate or marshal non-probate assets for the benefit of the creditors in an insolvent estate, and the majority seeks a process whereby once the PR discovers the estate is insolvent and the claims period has run, the PR would give notice to the creditors of such insolvency and then get out. The obligation then would be on the creditor to move forward in the probate proceeding regarding claims against the non-probate assets. Although still in the probate proceeding (rather than an independent action), the onus would be on the creditor to recover assets from the transferee. There was support for *pro rata* satisfaction of claims against the non-probate assets. Who would be the creditor in charge to invoke and lead this process remains to be seen. The final form of the process is still somewhat distant, and whether real estate and/or a *de minimis* threshold will be included was not discussed. The coming release by the NCUSL of the Uniform Transfer of Real Property on Death Act (TOD deeds), which could impact the RPPTL Ad Hoc Committee's proposal if passed in Florida, was not discussed.

The POA Subcommittee has been merged with the ELS's Medicaid Committee's POA Subcommittee. Robert Morgan is the ELS point guard. It appears that the RPPTL's effort has further slowed, and it is now planning for the 2010 session. Professor David Powell has been hired to be the "scrivener" for the RPPTL Committee. The most recent meeting of the RPPTL POA Committee was in Key Biscayne on Sept. 18. Robert Morgan was in attendance and reports below.

First, in the Uniform Act, there is a requirement in Section 114 (agent's duties) that will make any gifting or planning, especially by elder law counsel, subject to the matters in subsection (a), and it was decided to include within those areas of consideration for an agent to also look at preserving the principal's estate plan, as indicated in sub-Section (b)(6) of the same section. Moving that up to (a) would make it mandatory rather than merely suggestive, as in the Uniform Act.

Professor Powell will draft the new language to be voted on at the next meeting to be included in the gift and estate planning sections. There was a great deal of discussion over whether trusts can be created and/or amended by use of a POA. The litigators and estate planning attorneys were against this and wanted court supervision. However, I and others argued that if the POA at least includes the right to create, amend or change trusts, similar to QIT's, that should be sufficient, and as long as creation of a trust and elder care planning are consistent with the overall estate plan of the principal, that would be O.K. On a split vote, it was decided that if the power is in the POA, trusts can be created and amended.

Specificity to perform elder law planning will likely need to be in the POA. That means the Legal Zoom and Internet forms will likely be deficient and more guardianships should be expected if we do not undertake a massive effort to notify the public that the POA must be Florida-specific and very specific as to permissible planning if one wants to avoid court.

The next meeting of both the Ad Hoc Committee and the POA Committee will be during the Dec. 4-6 RPPTL Executive Council meeting in Tallahassee.

The Estate Planning Committee now has 40 members. We will be meeting in person on March 19, 2009, in Tampa. Telephone meetings will be held on an as-needed basis. If you have agenda items you want addressed or wish to join the committee, please send an email to *skotler@wga-law.com*.

Guardianship Committee

Carolyn Landon and Beth Prather, co-chairs

Please join the Guardianship Committee

The Guardianship Committee met on Oct. 3, 2008, after the Elder Law

continued, next page

Update held in Fort Lauderdale. The committee agreed to pursue three issues of interest to our members and their clients. Three committee members agreed to prepare white papers to be submitted to the Elder Law Section Executive Council for consideration. The first is the adoption of the Uniform Guardianship Act in Florida. The second is a conflict between Chapters 744 and 985 regarding liability of a guardian for his or her ward's actions. The third is statutory clarification permitting an "agency" to execute a petition to determine incapacity under Chapter 744.

Please contact committee chairs Carolyn Landon or Beth Prather if you have other issues concerning guardianship that you would like to have the committee address or if you would like to join the committee.

Legislative Committee

Ellen S. Morris, chair

Our committee met by telephone conference call on Aug. 29, and we were very productive. We are reviewing legislation proposed by Charlie Robinson on behalf of the RPPTL Section and sent to us as an interested section of the Bar. The legislation expands on healthcare surrogacy to codify a healthcare "representative" as someone appointed to make healthcare decisions for the principal without the need for a determination of incapacity.

We are also drafting changes to our legislative position statements within the Bar so we may be more proactive in opposing or supporting legislation. Please go to the Bar's website at *www.flabar.org* and click on Legislative Activity and then Legislative Positions and Elder Law Section to see our current position statements. Below are our proposed position statements. We have broadened the scope to allow us to immediately lobby for or against a bill within our broader position parameters without having to gain the Bar's approval first and have added positions we believe are within our practice. These will be voted on by the ELS Executive Council before being adopted. If you have any comments, please feel free to contact me.

2008 Elder Law Section Legislative Position Statements As proposed by the Legislative Committee

1. Supports legislation that protects individuals' rights with regard to their healthcare decisions regardless of incapacity.
2. Opposes legislation that erodes individuals' rights with regard to their healthcare decisions due to incapacity.
3. Opposes legislation that would limit awards, attorney's fees and costs in liability actions brought against nursing homes or assisted living facilities.
4. Supports legislation that would increase staffing ratios, governmental oversight and Medicaid reimbursement rates to improve the general quality of care for residents in any long-term care facility.
5. Opposes legislation that would decrease staffing ratios, governmental oversight and Medicaid reimbursement rates or otherwise decrease the general quality of care for residents in any long-term care facility.
6. Old number 4: Opposes legislation that would restrict or revoke driving privileges based solely upon aging factors.
7. Old number 5: Supports legislation that would enhance enforcement of provisions to revoke driving privileges from persons who are determined to be impaired.
8. Opposes legislation that would eliminate or diminish the rights of residents of any long-term care facility.
9. Old number 7: Opposes any legislation that would allow the clerks of court in any and/or all circuits to assess and collect audit fees or other fees in guardianship or probate cases that would be a percentage of the total amount or value of the respective guardianship or probate estate.
10. Old number 8: Opposes any legislation that would decrease current court authority and control over guardianship or probate matters while increasing, correspondingly or otherwise, clerk of court authority over these same matters.
11. Opposes any legislation that erodes the protections provided by Chapter 744 of the Florida Statutes.
12. Old number 10: Supports the development and implementation of a public education program stressing the need for screenings for memory impairment and the importance of early diagnosis and treatment of Alzheimer's disease and related disorders; and supports the mandate that the Department of Elder Affairs conduct or provide support for a study on the benefits of memory screenings and the scientific evidence on the techniques for memory screening.
13. Supports legislation that enhances and increases the protection of vulnerable adults wherever they reside.
14. Opposes legislation that erodes or decreases the protection of vulnerable adults wherever they reside.
15. Supports legislation that increases the personal needs allowance to qualified individuals residing in any long-term care, healthcare and/or residential facility.
16. Supports legislation to provide residents of assisted living facilities a process for administrative hearings and administrative review of discharge decisions.
17. Supports legislation requiring specific pleading against a vulnerable adult defendant.

18. Supports legislation recognizing the economic value of care provided to vulnerable adults by family members and friends.
19. Opposes legislation requiring filial responsibility for long-term care of adults.

As always, we value your input and welcome your participation on the Legislative Committee. Become a member of our committee by contacting me or Arlee Colman. On a personal note, I'd like to thank the board for awarding me, along with Rep. Elaine Schwartz, the Elder Law Member of the Year award. I am truly honored and grateful!

Unlicensed Practice of Law Committee

April Hill, chair

The Unlicensed Practice of Law Committee is making progress in defining and challenging UPL activities. We have been in contact with Lori Holcomb, the Bar's UPL counsel, and received the following statement from her:

The Standing Committee on the Unlicensed Practice of Law recently discussed the activities of Medicaid planners. The committee reviewed the "typical" activities of the planners. The committee voted to provide guidance as to which activities would constitute the unlicensed practice of law and which activities need to be examined on a case-by-case basis. The committee voted that based on existing caselaw, the following activities would constitute the unlicensed practice of law: establishing irrevocable trusts; establishing qualified income trusts; and hiring an attorney to review, prepare or modify documents for customers if payment to the attorney was through the company. The committee voted that the following activities would have to be determined on a case-by-case basis: restructuring assets, counseling customers on the best way to get Medicaid approval and advertising as an "elder counselor." The committee voted based on existing caselaw that the hiring of an attorney to review, prepare or modify documents for customers if there was a direct relationship with the attorney and payment was made directly to the attorney would not be the unlicensed practice of law.

As you can see, the Bar's UPL Committee established certain clear UPL violations as well as some activities that would be considered on a case-by-case basis. We have been asked to file complaints against people who hold themselves out as Medicaid planners by virtue of the fact that someone heard they were doing certain UPL activities. For very good reasons, we can only file complaints on those for whom there is proof that the activity occurred.

To those of you who come into contact with people who have experienced UPL and have been harmed by it, please encourage them to file a complaint. If needed, our committee will assist in completing the form and filing the complaint. If our assistance is not needed, please let us know of the filing so we can track it and benefit our entire section with the information.

Safeguard Our Seniors Task Force

Chief Financial Officer Alex Sink has created the Safeguard Our Seniors Task Force to raise awareness and better protect Florida's seniors against financial fraud, with an initial focus on annuity fraud. Jana McConnaughhay has been asked to represent the Elder Law Section on the task force, and will be joined by Lori Parham (AARP Florida state director), Adori Obi Nweze (Florida NAACP director), Jeffrey Helms (president, First Coast Financial Advisors), Mark A. Ober (state attorney, 13th Judicial Circuit), Bill Reilly (chief, securities regulation, Office of Financial Regulation), Lt. Glen Hughes (Division of Insurance Fraud), Curt Leonard (vice president state relations, American Council of Life Insurers), David Sizemore (regional director, Raymond James), Sean Stafford (Squire, Sanders & Dempsey) and Jim Brodie (legislative, external and cabinet affairs director, Florida Department of Veteran's Affairs).

Recovering funds for senior victims is typically difficult and can take many months to prosecute. Last session, CFO Sink advocated for legislation to increase the penalties against criminals who commit annuity fraud, but the Legislature failed to pass the bill. Without stronger penalties it is incredibly difficult for state attorneys to devote the resources necessary to prosecute these offenders. The task force will be addressing these and other issues affecting seniors and financial fraud.

The creation of the task force was announced at a press conference held on Sept. 30, 2008, and the first meeting of the task force was on Oct. 6, 2008, in Tampa. The work of this task force is important, as most elder law practitioners know from daily experience, and it is a credit to our section to have been included as further policies are developed to protect our clients. Any section member who would like to provide input on the discussions should contact Jana McConnaughhay at 850/385-1246 or *jana@mclawgroup.com*.

Joint Public Policy Task Force

Victoria Heuler and Christopher Likens, co-chairs

The Joint Public Policy Task Force had an active spring. In the wake of the Department of Children & Families' Nov. 1, 2007, implementation of the Deficit Reduction Act of 2005, several new issues arose concerning personal service contracts, certain real estate transactions and spousal refusal applications as well as continued concerns regarding delays in ongoing case processing. The task force was very successful in forming relationships with DCF Secretary Butterworth's legal and administrative staff, and under Secretary Butterworth's leadership, the DCF was increasingly open in disclosing its internal working documents and in communications with the task force regarding current issues. A much more cooperative relationship has been formed, and the task force will continue to nurture this more positive relationship toward increased disclosures and communication with the DCF. As of this writing, Secretary Butterworth has resigned and George Sheldon has been appointed as interim secretary for the DCF. Victoria Heuler (for AFELA) and Linda Chamberlain (for the Elder Law Section) signed a joint letter to Secretary Sheldon congratulating him on his interim appointment. A meeting is being requested with Secretary Sheldon to make sure the communication remains open with him as he guides the department.

The task force has addressed each of these issues with the assistant general counsel for the DCF, as follows:

1. Personal Service Contracts – Several denied cases were confined to three DCF districts that were applying what appeared to be new policy concerning PSC's. To provide clarity to all districts, the DCF began work toward rule development to have consistency in policy statewide. The task force is in communication with the DCF and is participating via comment in the early stages of this rule development. The DCF published a "working document" that could form the basis for an eventual rule to be proposed on PSC's, but as of this writing, the DCF has not yet published notice of an intent to engage in rulemaking vis a vis its "working document."

2. Real Estate Transactions – With respect to the purchase of a fractional interest in a home, the DCF states as follows:

If the applicant produces evidence from a third party (purchase and sale agreement, appraisal, comps, whatever is appropriate) regarding the value of the home, and the applicant produces proof of payment and a copy of the deed conveying an interest to the applicant, then the DCF has what it needs to value the purchase.

For example: Home value $100,000. Applicant pays $25,000, provides proof of payment to homeowner and receives a 1/4 interest in home according to deed, copy of which is also provided. No transfer penalty imposed.

3. Spousal Refusal – There have been sporadic reports of new policy being implemented concerning spousal refusal applications. All issues have been resolved to the satisfaction of members, thus far. The task force has tracked members' questions and requests for assistance regarding spousal refusal issues and has communicated the concerns to the DCF. As of this writing, no new statewide policy has been suggested or implemented by the DCF.

4. Ongoing Case Processing – After bringing several concerns to the DCF secretary this spring, task force members were asked by the DCF to participate in a DCF working group concerning ongoing benefits case processing and procedural issues. Due to Secretary Butterworth's retirement, this working group has not yet met. The task force is in contact with interim Secretary George Sheldon's office and will address all pending and continuing issues with Secretary Sheldon.

5. Divisor – The task force is working with the DCF to again raise the divisor for calculating penalties for transfers to reflect increases in the average cost of nursing home care. Communications are ongoing with integral DCF and AHCA staff to discuss a routine system that would allow for periodic increases in the divisor amount using agreed-to numbers for those periodic increases. The goal is to implement a system that avoids the need to engage in ad-hoc discussions at intermittent times to ensure that the divisor is an amount that fairly represents the increases in nursing home semi-private rates.

The task force continues, when necessary, to submit public records requests to the DCF concerning policy memoranda and communications regarding case processing in implementation of the DRA provisions and other issues that arise, including those listed above.

The task force was kept current on actions of the 2008 Legislature by our lobbyist Ken Plante, by legislative consultant Tom Bachelor and through ELS legislative chair and task force member Ellen Morris.

Public relations expertise continues to be driven by Al Rothstein. Through his efforts, 33 speaking engagements were created for our members this spring and summer. He is also assisting in an initiative to educate the public and elder law attorneys about elder exploitation. Work includes partnering with AARP to offer its members free living wills/health care surrogate forms during Elder Law Month 2009.

The Joint Public Policy Task Force is a committee of people representing the Elder Law Section and the Academy of Florida Elder Law Attorneys. Participants of the task force are determined by the chairs of each organization, and the task force reports to the organizations concerning legislation and policy issues and needs for organizational action. Funding for the task force is made possible by the AFELA Advocacy Fund, which is partially funded by a special assessment from The Florida Bar Elder Law Section. The task force has also instituted telephonic programming on various subjects of interest to members that has offered the opportunity for education, and now CLE's, to members. This educational programming also raises funds for the continued work of the task force. Thank you to everyone who has participated in these teleseminars and for your continued support of these efforts. If you have suggestions for future teleseminar topics or would like to be a tele-sponsor, please email Leonard Mondschein at *lenlaw1@aol.com*.

Meet your 2008 - 2009 Executive Committee

Linda R. Chamberlain Chair

Linda R. Chamberlain is a board certified elder law attorney who has practiced in the Clearwater area since 1991. Her areas of practice in elder law include Medicaid planning, Medicaid applications, Medicaid fair hearings and appeals, long-term care and disability issues, qualified income trusts, special needs trusts, asset protection, retirement planning and estate planning. During 1998, Ms. Chamberlain founded a comprehensive care management and consultation company, Aging Wisely Inc. She currently serves as president of Aging Wisely. In 2005, she founded a non-medical private duty home care company, Easy Living Inc., and serves as its president. Prior to practicing law, she was the director of social services at Lancashire Hall Rehabilitation Center in Lancaster, Pa., a field services director of the Area Agency on Aging in Kirksville, Mo., and a discharge planner at Doctors Hospital in Columbus, Ohio.

She received a Bachelor of Arts degree in social work from Oral Roberts University and her J.D. degree from the University of Cincinnati College of Law.

Ms. Chamberlain has served on the Executive Committee of the Elder Law Section of The Florida Bar since 2003. She served as the co-chair and chair of the Elder Law Committee of the Clearwater Bar Association from 2005 to 2007. She served on the Gulfcoast Legal Services board of directors from 2004 to 2007 and on the Clearwater Bar Foundation Board during 2006. She served on the Clearwater Yacht Club Youth Sailing committee from 2002 to 2004. She served on the board of directors of Partners in Self-Sufficiency from 1998 to 2003 and served as board president from 1999 to 2001. She previously served for seven years on the board of directors of St. Paul's School and has served as a liaison for Youth Leadership Pinellas and the Leadership Pinellas board of directors.

Professional memberships include The Florida Bar, National Academy of Elder Law Attorneys, Florida Academy of Elder Law Attorneys, Elder Law Section of The Florida Bar, Real Property, Probate and Trust Law Section of The Florida Bar, Clearwater Bar Association, Elder Law Committee and Probate Committee of the Clearwater Bar, National Association of Professional Geriatric Care Managers and the Florida Council on Aging.

Babette B. Bach Chair-elect

Babette B. Bach is a Florida board certified elder law attorney and the founder of Bach Elder Law. Her practice specializes in the legal needs of the mature or disabled client, including Medicaid planning, probate and estate planning, disability planning, guardianships and special needs trusts. Ms. Bach is one of only 400 attorneys who are nationally certified as an elder law expert by the National Elder Law Foundation.

Ms. Bach was born and raised in New Orleans. She graduated from Duke University and the University of Maine Law School. She is admitted to the Bar in both Maine and Florida and speaks fluent French.

Ms. Bach was co-counsel in *Gerkin v. Reiger/Levine*. This was a landmark civil rights class action lawsuit in Federal District Court, Middle District, Florida. As a result of this lawsuit, the State of Florida was forced to change the Medicaid policy in 2004 to provide for coverage of all uninsured medical benefits to more than 45,000 Medicaid recipients residing in nursing homes. This new benefit was funded by the Florida Legislature with an appropriation of $52 million.

Her community service includes a lifetime commitment to improving access to healthcare and legal services. She helped found the Michael C. Bach, M.D., Treatment Center for the care and treatment of indigent AIDS patients in Manatee County and the AIDS Project in Portland, Maine. Ms. Bach is vice chair of the board of the Gulf Coast Chapter of the Alzheimer's Association. She continues to actively lecture and publish in her fields.

Leonard E. Mondschein Administrative Law Division Chair

Leonard E. Mondschein, J.D., LL.M., is a shareholder in the law firm of Mondschein and Mondschein PA with offices in Miami and Aventura. He received his J.D. degree from the New England School of Law and his LL.M. degree from New York University. He is board certified by The Florida Bar in wills, trusts and estates and is an adjunct professor of law at the University of Miami School of Law for the LL.M. program in estate planning. Mr. Mondschein is past president of the South Dade Estate Planning Council, serves as first vice president of the Estate Planning Council of Greater Miami and is past president of the Academy of Florida Elder Law Attorneys. He also serves on the board of directors for the Alliance for Aging in Miami-Dade County, served as chairman of the Special Needs Trust Committee and is presently on

continued, next page

the Joint Public Policy Task Force. He served on the steering committee for the National Academy of Elder Law Attorney's 2005 Spring Symposium as chairman of the "Beyond Nursing Homes" subcommittee track as well as served on its Medicaid Task Force. He presently serves on the National Academy of Elder Law Attorney's Practice/Management Special Interest Group's steering committee.

Mr. Mondschein is a member of the Tax Section, Real Property and Probate Section of The Florida Bar as well as a member of the Miami-Dade County Probate and Guardianship Committee. He was a speaker on "Planning for ICP Medicaid Qualification With Real Property" at the Third Annual Public Benefits Seminar, sponsored by the Elder Law Section of The Florida Bar, and was the program chair for the Fourth Annual Public Benefits Seminar as well as the author of *Hospice Medicaid and Qualified Income Trusts* and *Medicaid Recovery, Debunking the Confusion*. His article "Beyond the Recovery - a Personal Injury Attorney's Guide to Post Settlement Issues" was published in the *Academy of Florida Trial Lawyer's Journal*. He has lectured on "How to Build an Eldercare Practice" at the Florida Institute of Certified Public Accountants' Multiple-Disciplinary Practice program as well as at the Elder Law Update and Special Needs Trusts seminars and at various CPA firms. He spoke at The Florida Bar's annual meeting on "Long Term Care Insurance." He has been named Chapter Member of the Year by the Florida Academy of Elder Law Attorneys and Member of the Year by the Elder Law Section. He has been published in the *Daily Business Review* as well as the *South Florida Business Journal* and *The Elder Law Advocate*. The firm publishes a monthly newsletter for social workers, discharge planners, nursing home administrators and financial professionals. Mr. Mondschein is a frequent writer and lecturer on estate planning and elder law topics. His practice is devoted primarily to elder law and estate planning.

Enrique Zamora Substantive Law Division Chair

Enrique Zamora is a partner with the firm of Zamora, Hillman & Veres, with offices in Coconut Grove. Mr. Zamora's practice focuses in elder law with an emphasis in the areas of probate administration and litigation, guardianship administration and litigation, trusts administration and litigation and estate planning. He was chair of the section's Guardianship Committee for five years.

Mr. Zamora is an adjunct professor at St. Thomas University School of Law, where he teaches elder law. He started the Elder Law Program at St. Thomas Law School as a joint project with the Honorable Mel Grossman and Professor Gordon Butler. Mr. Zamora is a director of the Foundation for Indigent Guardianship Inc. He was a member of the Guardianship Task Force where he represented the Elder Law Section. He is past chair of the Probate and Guardianship Committee of the Dade County Bar Association, where he also served as vice chair and secretary. Mr. Zamora is a former director of the Florida State Guardianship Association.

Mr. Zamora has acted as special general magistrate, guardian advocate and special public defender in Baker Act and Marchman Act proceedings for the last 12 years. He was chair of the 11 "D" Grievance Committee of The Florida Bar for three years.

He received his J.D. degree, cum laude, from the University of Miami in 1985.

Twyla L. Sketchley Secretary

Twyla L. Sketchley is a Florida Bar board certified elder law attorney with The Sketchley Law Firm PA in Tallahassee. Ms. Sketchley teaches elder law at Florida State University College of Law. She is a member of The Florida Bar and the State Bar of Montana. She is a member of the section's Legislative and Abuse, Neglect & Exploitation committees. She serves on the Real Property Probate and Trust Law Guardianship Committee and the Florida Probate Rules Committee. She is a member of the State Bar of Montana's Elderly Assistance Program, the National Academy of Elder Law Attorneys and is a board member of the Academy of Florida Elder Law Attorneys.

Ms. Sketchley works to ensure delivery of legal services to low-income elders and individuals with special needs and their families. She

continued, next page

Coming Soon!

ELS Certification Review

January 8 - 9, 2009 • Orlando, FL

has served as the Legal Services of North Florida's volunteer attorney for the Smith-Williams Community Center in Tallahassee since 2002 and serves on the Legal Services of North Florida's Volunteer Attorney Expert Legal Advice Panel. She serves on the Office of Public Guardian Inc.'s North Florida Guardian Support Project's advisory committee, provides legal consultation services for the project and assisted in developing and teaching the project's eight-hour guardianship training program for attorneys. She speaks regularly to community groups on elder law, long-term care planning and the rights of elders and individuals with special needs. In addition, she serves as the newsletter chair for the Tallahassee Women Lawyers and coordinates the organization's printed pro bono services campaign through its circuit-wide newsletter reaching more than 3,000 attorneys in North Florida.

In 2005, the Office of Public Guardian Inc. presented The Sketchley Law Firm with its Outstanding Legal Services Award. In 2008, The Florida Bar's Henry Latimer Center for Professionalism recognized Ms. Sketchley's service with its Professionalism Works Award. Ms. Sketchley has also been nominated for the 2008 Elder Rights Advocacy Hall of Fame Award presented by the National Association of Legal Services Developers.

Ms. Sketchley received her J.D. degree in 2000 from the University of Montana School of Law. She received a Bachelor of Arts from the University of Montana, majoring in English and minoring in Japanese language and culture. She is married to Nicholas Weilhammer, a member of the Elder Law Section, who also practices law with The Sketchley Law Firm. In her spare time, she gardens, beads, hikes and enjoys ballroom dancing with her husband.

Jana McConnaughhay Treasurer

Jana McConnaughhay is a principal in the McConnaughhay Law Group PA in Tallahassee, along with her partner, Lauchlin Waldoch. She has extensive experience in legal areas specifically affecting elders, including issues involving Medicaid, long-term care, estate planning, incapacity, guardianship, litigation and probate. She is a frequent speaker on elder law topics for local, state and national audiences.

Ms. McConnaughhay serves as chair of the board of directors of the Office of the Public Guardian and as an elected member of the Academy of Florida Elder Law Attorneys (liaison to the Elder Law Section). She is an appointed member of the Safeguard our Seniors Task Force created by State CFO Alex Sink and the Leon County Commissioners' Senior Advisory Board. She is a graduate of Leadership Tallahassee.

In 2007, Ms. McConnaughhay was selected Member of the Year by the Elder Law Section, and in 2006 was named Guardian Angel by the Office of the Public Guardian. She has previously served as chair of the Medicaid Substantive Committee and the Website Committee for the Elder Law Section and on the board of directors of the Florida State Guardianship Association.

She received a B.A. in accounting, with honors, from Furman University and a J.D. from the Vanderbilt University School of Law, where she was chosen the outstanding member of Vanderbilt's Moot Court Board.

Visit the section's website:

www.eldersection.org

Emma Hemness Immediate Past Chair

Emma Hemness is a Central Florida native and graduated from Florida Southern College, summa cum laude, with a B.S. in business administration. She obtained her J.D. degree from Stetson College University of Law in St. Petersburg.

In 1998, Mrs. Hemness founded the Law Office of Emma Hemness PA, which is located in Brandon, a few miles east of Tampa. She specializes in elder law, providing counsel and assistance to the elderly and persons with disabilities. Her law firm's areas of practice include Medicaid eligibility and qualification for in-home, assistive care and nursing home benefits; asset preservation; Veteran's Administration benefits and eligibility; special needs trusts; guardianship; elder abuse, neglect and exploitation; probate; and trust administration. She also offers traditional estate planning for families of all ages.

Mrs. Hemness is board certified in elder law by The Florida Bar. In addition to her state certification, she is also nationally certified in elder law by the National Elder Law Foundation as a certified elder law attorney. Mrs. Hemness is a member of the Academy of Florida Elder Law Attorneys, National Academy of Elder Law Attorneys and the Real Property, Probate and Trust Law Section of The Florida Bar. She is an officer of the West Central Florida Area Agency on Aging.

Mrs. Hemness is a managing member of Elder Planning Income Concepts LLC, offering real estate Medicaid planning comprehensive services to elder law attorneys serving their clients' needs for immediate Medicaid eligibility. She and her husband, Jay, also an elder law attorney with the firm, have one son, Nathan.

ELS Annual Retreat offers education and fun for all

The Elder Law Section held its annual retreat at the beautiful Sandpearl Resort on Clearwater Beach. We started off on Thursday evening with a cocktail reception honoring past, present and incoming chairs. The room offered a great view of the beach, and we had delicious hors d'oeuvres and lots of fun.

Friday kicked off with an Executive Council meeting. We bade farewell to Emma Hemness as the outgoing chair and welcomed Linda Chamberlain as the chair for 2008-2009. Thank you, Emma, for all of your hard work and dedication.

The Executive Council meeting was followed by lunch. DCF Secretary Bob Butterworth was scheduled to be our featured speaker but was unable to attend due to illness. Nick Cox, regional director for the SunCoast Region of the Department of Children and Families, agreed to speak in Secretary Butterworth's place. Nick is a terrific speaker, and he told us how Bob Butterworth was committed to making the DCF more accessible, more responsive and more user friendly. He brought with him Jennifer Lima-Smith, the SunCoast Region's legal counsel. She also assured us that DCF is dedicated to being open, receptive and quick to respond. Nick and Jennifer encouraged us to contact them if we had any issues with our local DCF offices that we could not get resolved. We can only hope that this willingness to respond continues in spite of the departure of Bob Butterworth as secretary of the department.

Following lunch, we had committee meetings. The committee meetings were held in one big room with special hospitality beverages. Often our committee meetings are held by phone, so this was a new and productive experience to have all of the committees meeting in one place. We had the opportunity to hold face-to-face meetings, recruit new members and visit with the other committees.

Later that afternoon was the kids' cruise. The kids were treated to a treasure hunt, water gun duel and a pirate adventure. Then it was the adults' turn. The Pirates Ransom took us on a sunset cruise around Clearwater Beach. There were pirate stories, limbo, dancing, a fire show and more. A good time was had by all.

Saturday started off early with a detailed and informative discussion of the DRA. Howie Krooks did an amazing job of reviewing the new Medicaid issues brought about by the Deficit Reduction Act of 2005. Thanks, Howie! Carolyn Sawyer then followed up with a passionate and compelling presentation on the exploitation of the elderly, informing us all of what we can do to assist our clients who are so often the victims of the unscrupulous. Our Saturday lunch speaker was Carol O'Dell, author of *Mothering Mother: A Daughter's Humorous and Heartbreaking Memoir*. The book tells Carol's story of caring for her ailing mother. Check out Carol's blog at *http://home.comcast.net/~cdodell/* for a sample of her compelling story.

Saturday afternoon was family time on beautiful Clearwater Beach. The waters of the gulf were warm and inviting, and the hotel's pool was sparkling. Just down the street was miniature golf and the Clearwater aquarium, and there were lots of restaurants within walking distance of the hotel. Nearby, Pier 60 offered a sunset celebration with a festival. This free family event featured artisans, crafters, street performers and live musical entertainment.

Sunday and its farewell breakfast came all too soon, and then it was time to pack up and go home. But the 2008 Elder Law Retreat was a great one. We hope to see you all at the 2009 Retreat!

One last official act: Passing the gavel to Linda Chamberlain, incoming chair of the Elder Law Section

Scenes from the ELS Retreat & Annual Meeting ...

Mrs. Zamora, Enrique Zamora, Marjorie Wolasky, Carolyn Landon and Jay McCampbell

Steve Kotler, Linda Chamberlain and Cary Chamberlain

Len Mondschein and Charlie Robinson

Arrrrrrr! A good time was had by all aboard the Pirate's Ransom for the Friday sunset cruise.

Tom Batchelor, John Staunton, Melody Staunton, Louise Robinson and John Clardy

Babette Bach and Travis Finchum

Thank you, Randy! (To our friend and elder law colleague, Randy Bryan, currently serving in Iraq)

A farewell present to outgoing chair, Emma Hemness

Takin' care of business at the Executive Council Meeting

Section Member of the Year and Charlotte Brayer Award Presented during Elder Law Retreat

During the Elder Law Retreat held July 17-20, 2008, in Clearwater, Fla., Immediate Past Chair Emma Hemness announced her selection for the section's Member of the Year award and the Charlotte Brayer award.

Member of the Year Award

As one of the last duties as chair of the Elder Law Section, Emma Hemness had the privilege of selecting and recognizing the section's Member of the Year award recipient. She noted that the decision to select merely one individual was too difficult because of the outstanding work of two members of the Elder Law Section: Ellen Morris, Elder Law Associates, Boca Raton; and state Representative Elaine Schwartz, Hollywood. The common theme shared by these two women was the service they provided to the Elder Law Section's members and the elderly in the legislative arena.

Attorney Ellen Morris dedicated countless hours to legislative issues of significant importance to the Elder Law Section. She took one component of the Elder Law Section which was, in effect, nonexistent and grew it into a formidable presence that can continue to be expanded. This has helped grow the importance of the section among other Florida attorneys and administrative and legislative entities.

Representative Elaine Schwartz, an elder law attorney by profession, took her longstanding passion for and professional expertise on aging issues to Florida's Capitol. The elder law community benefited greatly from her voice. One of her crowning achievements was securing funding for 4,000 new slots in the Medicaid Diversion program for seniors when budget shortfalls were the rule. In addition, Rep. Schwartz was the active force in limiting any expansion of Medicaid pilot programs, which could have drastically impacted seniors' abilities to have necessary healthcare services.

Emma emphasized that it was not an easy task to select the section's Member of the Year recipients among so many outstanding elder law attorneys who tirelessly gave countless hours to improve the section. Those individuals deserving an honorable mention are Jana McConnaughhay, Tallahassee; Leonard E. Mondschein, Miami; Robert Morgan, Jacksonville; Carolyn Sawyer, Orlando; and Twyla Sketchley, Tallahassee.

Charlotte Brayer Award

Longtime advocate for the elderly and Tampa resident **Anna Spinella** received the section's Charlotte Brayer award. Not able to be present herself because of her responsibilities as a caregiver spouse, Emma Hemness accepted the award on Anna's behalf and noted her long-term commitment to advocacy on behalf of seniors. "I have the pleasure of knowing Anna personally through her work with the West Central Florida Area Agency on Aging," Emma says. "I continue to be impressed with how many high-ranking members of government agencies, as well as United States senators and congressmen, know and refer to Anna on a first-name basis. She is simply tenacious when it comes to promoting the needs of the elderly. And her comments at public hearings with regard to funding elderly services can be summed up in one phrase: 'Show me the money!' Anna truly deserves this award."

The Charlotte Brayer award is given each year by the chair of the Elder Law Section in memoriam of the extraordinary commitment to serving the elderly of Florida of its namesake, Charlotte Brayer. Charlotte was a charter and founding member of the Florida Bar Elder Law Committee (now the Elder Law Section) and the Academy of Florida Elder Law Attorneys. She also served the National Academy of Elder Law Attorneys (NAELA) with distinction, receiving the President's Award for outstanding service as an elder law attorney in May 1997. Further, she was a tireless advocate for persons with mental illness. She worked toward two major goals: national health insurance and expanded legal services for elders. She leaves a rich legacy of commitment, service and caring.

Pro Bono Service Awards nominations

Each year, the Florida Supreme Court and The Florida Bar give special recognition to lawyers, groups and a member of the judiciary who have freely given their time and expertise in making legal services available to the poor. The awards ceremony will be held at the Florida Supreme Court at 3:30 p.m., Thursday, Jan. 29, 2009. Pro Bono Service Awards nominations must be received by Nov. 7, 2008. For more information, contact Dorohn Frazier at dfrazier@flabar.org or 850/561-5764.

New this issue!

ELS mentors answer your questions

by Jason A. Waddell

Did you know the Elder Law Section has a team of mentors ready to help attorneys starting new practices in elder law? Well there is, and we are starting this new feature of *The Advocate* to provide some of our more experienced members' insights about the elder law practice. For each issue, I will be interviewing several mentors on topics that new attorneys often face. For example, this article will focus on what should be a primary focus when getting started.

I posed the following question to our team of mentors: What advice would you give to new attorneys to elder law if their firm does not have an attorney to guide them with learning the procedural and substantive law in areas of practice such as guardianship, Medicaid planning, special needs planning and the like?

The response: GET INVOLVED!

The resounding suggestion as to how to get involved was to attend CLE's. Twyla Sketchley of The Sketchley Law Firm in Tallahassee believes you should attend EVERY Florida Bar Elder Law Section or AFELA program offered "from the moment you decide to practice elder law." The reason is threefold: 1) you learn the law; 2) you learn who are the experts (i.e., who to trust for help if you have a tough question); and 3) you will get "suggestions, tips and answers" from other attendees. Victoria Heuler of McConnaughhay, Duffy, Coonrod, Pope & Weaver PA in Tallahassee added to the list of benefits that by "meeting other elder law attorneys around the state … you will get the 'real deal' when it comes to the pros and cons of our practice area." She added that courses from Stetson are also a good source of information as are those by NAELA (for a more global perspective).

For many (especially along the Gulf Coast), finding the time for CLE's and conferences several times a year is not always practical. I turned to our mentors for other resource suggestions when faced with limited time and ability to attend the long distance CLE's. Twyla and Victoria were joined by Steve Quinnell of Chase, Quinnell & Jackson in Pensacola in recommending Jerry Solkoff's *Florida Elder Law*, a practice guide, as well as *Planning for the Elderly in Florida* by Morgan, Boyer and Jackson, as good reference resources. Victoria also suggested reading "as many past issues of *The ELS Advocate* as possible." Twyla and Victoria recommended getting on the AFELA listserv ASAP. Twyla said the questions on the listserv "provide everything from practical solutions, forums for difficult problems, substantive legal answers or simple congratulations and recognition on a hard-fought case, all of which can be very useful when facing a similar situation in practice."

Finally, Steve stated that sometimes you just have to get your hands dirty to learn what you are doing. He suggested getting to know your community by introducing yourself to and working with people in Adult Protective Services, the Medicaid office, home healthcare organizations, trust departments, hospital social work, church senior citizen support groups, Alzheimer's charities, hospice, etc. Beyond that, he suggested making the court system aware that you are interested by signing up as a court appointed attorney for guardianships and 415 cases, participating in guardianship education classes and being available for "basically any court appointment for a disabled indigent person or minor." Twyla added that you should definitely get involved with the section by joining a committee. She is a strong believer that you gain "substantive knowledge it would take years to build through legal research and basic trial and error practice."

O.K., so there you have your game plan for getting started: Go to CLE's, choose good reading material and get involved in your community and Bar committees! If you would like to become a mentor or a mentoree, or would like additional information, contact me at *jason@ourfamilyattorney.com* or Angela Warren at *awarren@mcelderlaw.com*. Also, the Mentoring Committee is in the process of organizing a teleconference series. The first teleconference in the series will be Nov. 6, 2008, at 11 a.m. Eastern/12 noon Central. Future conferences will be held the first Thursday of every other month. Each teleconference will be on a different area of elder law and led by different mentors with a casual question and answer format. Check the Mentoring Committee webpage for more information and updates at *www.eldersection.org*.

Timely filing for ICP Medicaid in the electronic age

The tale:

In May 2008, Attorney Jones met with Mrs. Smith, the wife of a man who had been transferred from a hospital to a rehabilitation facility a few months ago. This facility also provided custodial care. Mrs. Smith told Attorney Jones that her husband was presently in rehabilitation, and she did not know when it would end and become custodial care. A few days later, while Attorney Jones was collecting the required documents to apply for ICP Medicaid in the future, Mr. Smith was rushed to the hospital and died four days later. Although Attorney Jones worked with Mrs. Jones after her husband's death preparing new advance directives for Mrs. Jones as well as clearing title to jointly owned property and drafting a new will, nothing further was mentioned about Mr. Smith's status in the skilled nursing facility concerning the termination of rehabilitation days. The nursing home never mailed Mrs. Smith a bill, and neither she nor Attorney Jones ever inquired at the nursing home about any outstanding bill. On Aug. 29, 2008, at 4 p.m., Attorney Jones received a call from the nursing home asking about the status of the case. Attorney Jones informed the nursing home that no case had ever been filed because Mr. Smith was still in rehabilitation when he was taken to the hospital. Since Mr. Smith never returned to the nursing home, Attorney Jones assumed that there was no reason to file for ICP Medicaid. The administrator of the nursing home informed Attorney Jones that rehabilitation ended three days before Mr. Smith was admitted to the hospital. Even though neither a bill was ever sent nor was a previous telephone call made to Attorney Jones, the nursing home assumed that he was working on the case. The administrator further informed Attorney Jones that Mrs. Smith signed a form indicating that rehabilitation was ending that day. Unless ICP was approved, her husband's estate would be responsible for all subsequent days of custodial care.

Attorney Jones called Mrs. Smith who had no recollection of signing such a form. She was unaware of any money owed to the nursing home since she never received a bill or a telephone call. Attorney Jones agreed to file the case that day. After he finished the work of the day, he went on line and filed the case as promised. When the email confirmation printed out it said, "Thank you for your application of Sept. 2, 2008." Attorney Jones knew that a September application would not allow for ICP Medicaid payments further back than the month of filing plus three months back. The month of May would be four months back and therefore would not be approved for payment. However, Attorney Jones had proof from the date stamped on the bottom of the email that it was actually filed on Aug. 29, 2008. He was therefore able to show the DCF caseworker that the actual date of filing was Aug. 29, 2008, and not Sept. 2, 2008. The caseworker, having no idea what to do, checked with DCF in Tallahassee and was told not to approve the case. She told Attorney Jones that filing after hours was analogous to arriving at the DCF local office after closing time with no way to prove when you were there. Attorney Jones, who at this point was extremely frustrated, researched the Access Florida Program Policy Manual and to his surprise found Section 0640.0101, which states in part as follows:

> If a site receives a web-based or facsimile application after normal business hours, establish the first business day following receipt as the application date.

Tips & Tales

Leonard Mondschein

While Attorney Jones considered filing for a fair hearing, he knew that the department (DCF) was authorized to adopt regulations to administer its program and that there was a presumption of reasonableness, absent proof to the contrary. It appeared to Attorney Jones that this was a reasonable rule, although an argument could be made that computer technology was such that it could record the date and time of an application, as opposed to the arrival at a local DCF office after hours.

The tip:

There is actually more than one tip to this tale.

Tip #1: Remember the rule stated above. While a computer can record the actual date and time that an application is filed, DCF has a published rule to the contrary. That rule does not even allow for the filing of a case after 5 p.m. to be the next day in all cases but, in fact, the next *business day*, which in Attorney Jones's case was after Labor Day on Sept. 2, 2008.

Tip #2: Never assume anything. It is easy to forget to check with a nursing home after the death of a patient who was originally in rehabilitation at the initial client meeting. This is especially true when the nursing home neglects to send a bill to the family or does not communicate with the attorney the fact that rehabilitation has ended.

Bonus Tip #3: A similar situation arises when a nursing home patient dies while you are trying to obtain information from a pension or an annuity company using a durable power of attorney. If the company is informed of the patient's death, it will require an estate opened and a personal representative appointed. If you are probating the estate or if

continued, next page

Rep. Schwartz honored by Florida Council On Aging

Representative Elaine Schwartz was honored with the prestigious 2008 Legislative Advocacy Award from the Florida Council on Aging in Orlando on Aug. 13. The state director of the Florida AARP, Lori Parham, referred to Rep. Schwartz's advocacy for the elderly as "dazzling" in her nomination letter to the FCOA. In Director Parham's words:

Florida AARP Director Lori Parham with Rep. Elaine Schwartz, recipient of the 2008 FCOA Legislative Advocacy Award

Representative Schwartz, an attorney specializing in elder law, has brought to the House Healthy Seniors Committee and to the Healthcare Council her long-standing passion for, and professional expertise on, aging issues. The aging community can count on Rep. Schwartz to tackle the most challenging of issues and to ask the "hard questions." At every opportunity in the committee process and in the House chamber, she has brought to the fore concerns about the Medicaid eligibility determination processes. She also had a particularly dazzling impact on the Medicaid acute health care pilots. In response to many of the criticisms of the health care pilots (especially the one in Broward County); she doggedly pushed forward and conducted a legislative "roundtable" relating to positive and negative criticisms of the pilots. That roundtable included legislators, Medicaid administrators, interest groups, health care providers, Medicaid recipients and the general public. It also garnered considerable press attention and had a profound impact on the future course of the health care pilots. Shortly after that roundtable, AHCA's Secretary recommended that the Legislature not expand the pilot sites during the 2008 Regular Session.

For more information on Rep. Schwartz's advocacy for the aging, call 954/924-3813.

Tips & Tales
from preceding page

another attorney is probating the estate, leaving you out of the loop, by the time a personal representative is appointed, you may not be able to go back as far as the nursing home requires to cover all payments. The bonus tip is to keep track of the time while the estate is being opened; if you see a time problem on the horizon, file the case without all of the information needed. Even if the DCF caseworker closes the case, you can always reopen it when you have all of the documentation and information. Payment will relate back to the date payment is needed. However, AHCA has a one-year limitation on payment from date services are rendered, absent special exception.

***Leonard E. Mondschein, J.D., LL.M.**, is a shareholder in the law firm of Mondschein and Mondschein PA with offices in Miami and Aventura. He received his Juris Doctor degree from the New England School of Law and his Master's of Law degree from New York University. He is board certified by The Florida Bar in wills, trusts and estates and is an adjunct professor of law at the University of Miami School of Law for the LL.M. program in estate planning.*

Website Updates

Check out our committees online!

If you are interested in becoming more involved with a section committee, you can find out when the committee members are having a conference call by checking the committee page of the Elder Law Section's website. Calls that are scheduled will be at the top of the page, or you can scroll down to the particular committee you are interested in to see if it has a schedule of calls posted. Almost all do. If you want to join a call, you can contact the chair directly or email Arlee J. Colman at *acolman@flabar.org* to get the call-in instructions. You are bound to find something that interests you on the committee page at *www.eldersection.org*.

Protecting the elderly from financial fraud and unsuitable investments

by Scott C. Ilgenfritz

Recently, federal and state securities regulators have recognized the perils posed to seniors as the result of investment fraud and the sales of unsuitable securities, and have announced an initiative to protect seniors from such fraud and unsuitable securities sales.[1] Regulators have done so because of the increasing percentage of the United States population aged 65 years and older, and the concentration of consumer financial assets in that segment of the population.[2]

Seniors become victims of securities fraud and unsuitable investments in a variety of ways, including: 1) ordinary negligence of stockbrokers, investment advisors or other financial professionals in recommending unsuitable investments; 2) attending purportedly educational "free lunch" seminars, which are disguised sales presentations; 3) unwittingly trusting financial professionals who inaccurately represent themselves to be "certified senior advisors," "senior specialists" or "retirement specialists"; and 4) being induced to sell suitable retirement assets or to exchange an existing annuity contract for a variable annuity or an equity indexed annuity. Awareness of means by which the elderly are financially victimized, and their rights and remedies should they be so victimized, is crucial to protecting them from potential financial ruin.

In 2006, the Securities and Exchange Commission (SEC), the North American Securities Administrators Association (NASAA), the Financial Industry Regulatory Authority (FINRA) and state securities regulators, including the Florida Office of Financial Regulation, undertook an examination of 110 brokerage firms, investment advisory firms and insurance firms in several states with large populations of retirees. Those examinations culminated in the issuance in September 2007 of a report by the SEC, NASAA and FINRA entitled "Protecting Senior Investors: A Report of Examinations of Securities Firms Providing 'Free Lunch' Sales Seminars" (the "report"). The examinations focused on brokerage, investment advisory and insurance firms that used invitations and advertisements targeted to senior citizens for free lunch "educational" or retiree financial protection seminars. The report contained the following troubling findings, evidencing the financial victimization of senior citizens:

1. Although advertisements and invitations for the seminars frequently identified them as "educational" or as "workshops," the seminars were designed to sell investment products to seniors, including variable annuities and equity indexed annuities;
2. The advertising and sales materials used by 57 percent of the firms examined appeared to be misleading or exaggerated or included apparently unwarranted claims;
3. Ninety-six percent of the firms examined had ineffective supervisory and compliance controls in place with respect to the review of seminar materials to ensure their compliance with applicable securities laws and rules, and 59 percent of the firms examined were found to have poorly supervised the sales seminars;
4. Twenty-three percent of the firms examined had had registered representatives or investment advisors recommend unsuitable investments to seniors who attended the seminars;
5. Indications of fraudulent practices involving misrepresentations of risk and return, the liquidation of customers' investments without their consent or knowledge and the sale of fictitious investments were evidenced in the sales seminars of 13 percent of the firms examined; and
6. Regulators issued deficiency letters or letters of caution outlining apparent rules violations and other deficiencies to 78 percent of the firms examined, and 23 percent of the firms examined remained under review for possible further investigation or action by state or federal regulators.[3]

The message of the report is loud and clear. If any of your elderly clients are attending such seminars, they should stop going to them.

The report identified as a misleading sales practice the use of senior designations by individuals presenting the seminars, such as "Certified Senior Advisor," "Elder Care Asset Protection Specialist" or "Chartered Retirement Planning Counselor." These terms suggest that the financial professional conducting the seminar has some special credential or certification from an educational institution or regulatory authority, when there is no such recognized designation.[4] FINRA has separately recognized that such designations can be misleading and can constitute violations of FINRA Conduct Rules when such expertise does not exist.[5] Until the 2008 Florida legislative session, only four states, not including Florida, had enacted regulations with respect to professional designations by stockbrokers, investment advisors and other financial professionals. At the end of the 2008 regular session, the Florida Legislature passed the "John and Patricia Seibel Act." The act included an amendment to § 626.9541, Florida Statutes, to make unlawful the use of designations that misrepresent the qualifications of an insurance agent licensee, including a certification or a qualification to provide specialized financial advice to senior citizens.[6]

All investors, including seniors, need to investigate a potential financial professional before making investments with or through him or her. The steps recommended by FINRA to investigate a securities licensed investment professional are available on its website at the "Understanding Professional Designations" page described in end note 7.

continued, next page

NASAA has issued an investor alert regarding the so-called senior specialists.[7] The alert identified the most common transactions recommended by such "specialists" to be the liquidation of securities for the purchase of equity indexed or variable annuity products.

In 2008, with the adoption of the Seibel Act, the Florida Legislature likewise recognized that seniors are frequently the victims of unsuitable investment advice to liquidate securities to purchase annuities or to participate in annuity exchanges. The amendments of the act included the revision of § 627.4554, Florida Statutes, which is entitled "Annuity investments by seniors."[8] A violation of § 627.4554 does not create or imply a private cause of action. However, the statute sets forth suitability and supervisory requirements that must be met by insurers and insurance agents in recommending annuity transactions. The amendments require that agents gather detailed suitability information concerning their customers and replaced a subjective suitability standard with an objective one.[9] Although there is no private right of action under the statute, its provisions reflect standards of care for insurance agents and insurers.

Stockbrokers and the firms for which they work are subject to the suitability standards set forth in the FINRA Conduct Rules when recommending the liquidation of securities to purchase any annuity product or when recommending the purchase of securities, including variable annuity products.

Many, if not most, investors do not realize that stockbrokers, investment advisors, other financial professionals and the firms for which they work can be held liable for investment losses suffered by them based upon proof of ordinary negligence. The FINRA Conduct Rules impose standards of conduct on stockbrokers and the firms for which they work with respect to sales literature and advertising materials, supervision and recommendations of investments to customers.[10] Under Conduct Rule 2310, which is entitled "Recommendations to Customers (Suitability)," stockbrokers and the firms for which they work are required to make reasonable efforts to obtain information concerning each customer, including a customer's financial tax status, investment objectives and other information considered to be reasonable in making recommendations to a customer. Once that information has been gathered, a stockbroker and his or her firm must have reasonable grounds to believe that each investment recommendation is suitable for the customer based on his or her profile. The suitability rule has been held to be an appropriate indicia of the standard of conduct required of a stockbroker to practice his or her profession, the violation of which is proof of negligence.[11] FINRA has interpreted the suitability rule to require that stockbrokers and their brokerage firms take into account a customer's age, life stage and liquidity needs in assessing the suitability of an investment.[12]

Similarly, under Chapter 517, the Florida Securities and Investor Protection Act, proof of a negligent violation of the antifraud provision of the act, § 517.301, is sufficient to establish liability on the part of a stockbroker or his or her brokerage firm.[13] Under Florida law, the recommendation of an unsuitable investment is a violation of § 517.301.[14]

Registered investment advisors are subject to the Investment Advisors Act of 1940 and/or Chapter 517. As a matter of law, investment advisors owe a fiduciary duty to their customers.[15] Likewise, under Florida law, stockbrokers and brokerage firms owe a fiduciary duty to their customers.[16]

Thus, seniors may well have valid claims to assert if they have suffered losses as a result of high risk or illiquid investments, an improper asset allocation, overly active trading, margin trading, an over concentration in annuity products or annuity switching. Seniors' investment professionals and the firms for which they work can be held liable for negligently recommending unsuitable investments or engaging in unsuitable trading activity.

Scott C. Ilgenfritz *is a partner of Johnson, Pope, Bokor, Ruppel & Burns LLP, with offices in Tampa, Clearwater and St. Petersburg. He is board certified by The Florida Bar as a business litigation specialist. One of the focuses of his practice is representing investors in arbitration proceedings against stockbrokers, investment advisors, other financial professionals and the firms with which they are affiliated. His securities practice website is* www.florida-securities-fraud-lawyer.com.

Endnotes:

1 "[I]n May 2006, the SEC and the NASAA announced a coordinated nationwide initiative designed to protect seniors from investment fraud and sales of unsuitable securities." The initiative coordinated by the FINRA, the SEC and the NASAA includes three components: education and outreach to seniors and persons nearing retirement age; "targeted examinations to detect abusive sales tactics aimed at seniors; and aggressive enforcement of securities laws in cases of fraud against seniors." *See Protecting Senior Investors: Report of Examinations of Securities Firms Providing "Free Lunch" Sales Seminars* at 1 (September 2007) (hereinafter the "report"). The report is available at *www.finra.org/reports.*

2 According to FINRA Regulatory Notice 07-43, "[t]he United States population aged 65 years and older is expected to double in size within the next 25 years. By 2030, almost 1 out of every 5 Americans—approximately 72 million people—will be 65 years or older." According to data presented by the SEC at its initial "Seniors Summit" in July 2006, "75% of the nation's consumer financial assets, valued at $16 trillion, are held by households headed by someone who is 50 or older." Report at 1.

3 *See* report at 4-5.

4 *See* report at 15.

5 *See* FINRA Regulatory Notice 07-43 at 5 (September 2007).

6 *See* CS/CS/SB 2082, section 7. The act takes effect on Jan. 1, 2009. The FINRA has gathered information concerning numerous professional designations for financial professionals, including the name of the designation, the issuing organization, the prerequisites and experience required, educational and examination requirements and accreditation. The designation listing is available on the FINRA website at *http:\\apps.finra.org\DataDirectory\1\prodesignations.aspx.*

7 Regulators Urge Investors to Carefully Check Credentials of "Senior Specialists," December 12, 2005. The alert is available at *http:\\www.nasaa.org\Investor_Education\Senior_Investor_Resource_Center.*

8 *See* CS/CS/SB 2082, section 9.

9 *Id.*

10 *See, e.g.*, FINRA Conduct Rules 2120, 2210, 2310 and 3010.

11 *See Miley v. Oppenheimer & Co.,* 637 F.2d 318, 333 (5th Cir. Unit A 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng,* 697 F. Supp. 1224, 1227 (D.D.C. 1986); *Mihara v. Dean Witter & Co.,* 619 F.2d 814, 824 (9th Cir. 1980).

12 *See* FINRA Regulatory Notice 07-43 at 3.

13 *See, e.g., Gochnauer v. A.G. Edwards & Sons, Inc.,* 810 F.2d 1042, 1046 (11th Cir. 1987); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Byrne,* 320 So.2d 436 (Fla. 3d DCA 1975).

14 *See Newsom v. Dean Witter Reynolds, Inc.,* 558 So.2d 1076 (Fla. 1st DCA 1990).

15 *See SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 192 (1963).

16 *See Gochnauer v. A.G. Edwards & Sons, Inc.* 810 F.2d 1042, 1051 (11th Cir. 1987); *Ward v. Atlantic Security Bank,* 777 So.2d 1144, 1147 (Fla. 3d DCA 2001).

CMS threatening transfers into pooled trusts by those 65+

by Susan H. Levin

The primary goal of the Medicaid provisions of OBRA '93 was to restrict the use of trusts and transfers of assets to qualify for Medicaid. Exempted from such restrictive treatment of so-called Medicaid Qualifying Trusts, however, were three types of trusts described in 42 USC § 1396p(d)(4), all of which make some provision for the State to receive the trust assets remaining upon the death of the disabled individual. Because the State is a remainder beneficiary, the trusts are not treated as a countable asset in determining the eligibility of the Medicaid applicant. The first exempted trust is a special needs trust for a disabled individual under the age of 65 established by a parent, grandparent, guardian or court for the sole benefit of the disabled individual, as provided in (d)(4)(A). The second exempted trust is a "Miller" income trust, as provided in (d)(4)(B). The pooled trust established by a nonprofit association for the sole benefit of a disabled individual, as provided in (d)(4)(C), is the third exempted trust.

OBRA '93 also imposed greater penalties for transferring assets to trusts. Exempted from the transfer-to-trust rules were assets "transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled. ..." 42 USC § 1396p(c)(2)(B)(iv).

When states were drafting regulations implementing the federal OBRA '93 changes, the question arose as to whether disabled individuals 65 and over could transfer assets without penalty to a pooled trust that was clearly noncountable pursuant to (d)(4)(C).

At that time it was recognized by the Health Care Financing Administration (HCFA), now the Centers for Medicare & Medicaid Services (CMS), that last-minute legislative drafting created many inconsistencies and omissions in OBRA '93. For example, although the three (d)(4) trusts are clearly exempted from accountability rules, the drafters neglected to provide the same degree of clarity about whether all transfers to such exempted trusts should be exempted from penalty. CMS resolved the ambiguity with regard to transfers to (d)(4)(B) Miller trusts by allowing the transfers (with certain conditions), claiming that to do otherwise would make the (d)(4)(B) provisions "a nullity." *See* State Medicaid Manual § 3259.7C. The majority of states in the mid-1990's resolved the ambiguity about transfers to pooled trusts by allowing disabled individuals *of any age* to transfer assets without penalty to a pooled trust.

Since 1993, a significant number of nonprofit associations throughout the country have created pooled trusts to serve disabled individuals. Since pooled trusts are the only type of special needs trust that can be established and funded by a disabled individual *him- or herself* and the only type of special needs trust that could be funded without penalty by a disabled individual *age 65 and over*, the number of beneficiaries enrolled in pooled trusts is considerable.

After the passage of the Deficit Reduction Act of 2005 (DRA), half-a-loaf transfer planning came to a grinding halt. Disabled individuals of modest means in need of nursing home care could no longer protect even $10,000 to pay for items or services not covered by Medicaid. The ability to transfer assets to a pooled trust became even more critical.

Emboldened by the DRA, state Medicaid agencies began to indiscriminately attack any action taken by a Medicaid applicant that resulted in the diversion of even nominal amounts of money from being expended on nursing home costs. Some states focused on disallowing personal care contracts, others on penalizing $100 birthday gifts.

The Georgia Medicaid agency took the position that disabled individuals 65 and over cannot fund a pooled trust without incurring a transfer penalty. Georgia elder law attorneys responded by mobilizing support within the Georgia Legislature for a bill that would allow transfers by disabled individuals of any age to a pooled trust without penalty. After more than a year of intense advocacy, the Georgia Legislature was poised to pass the bill despite objection from the state Medicaid agency.

In the meantime, an attorney for the Georgia state Medicaid agency contacted CMS for clarification of federal law. In response, a CMS memo dated April 14, 2008, from Gale Arden (Baltimore) to Jay Gavens (Atlanta Region IV) stated that "only trusts established for a disabled individual age 64 or younger are exempt from application of the transfer of assets penalty provisions (*see* section 1917(c)(2)(B)(iv) of the Act)." At the eleventh hour, the attorney for the Georgia Medicaid agency, armed with an email from CMS reflecting the position of the April 14, 2008, letter, threatened the Georgia Legislature that state legislation allowing disabled individuals 65 and older to fund a pooled trust without penalty would render Georgia out of compliance with the federal Medicaid program. The legislative sponsor pulled the bill. Georgia remains bereft of the pooled trust option for its disabled seniors. Even worse, CMS has now asked all of its regional administrators to initiate contact with the states to make sure they are in compliance with this new interpretation of federal law.

The CMS memo appears to have been issued without careful analysis and without knowledge of state practice on this issue. For example, the CMS memo fails to acknowledge any difference between transfers by a third party (non-parent) to a pooled trust for the benefit of a 65+ disabled

See "Book review," page 25

Transfers into pooled trusts
from preceding page

individual and a transfer by a 65+ disabled individual to a self-settled pooled trust for the individual's sole benefit. Transfers by a 65+ disabled individual to a self-settled pooled trust should not be subject to penalty both because such a transfer is a fair market value exchange and because the OBRA '93 transfer to trust rules do not impose a penalty when the funds placed in an irrevocable trust can be made available to the beneficiary. Moreover, there appears to be evidence that CMS in Baltimore agreed with this conclusion in an email to the Wisconsin Medicaid agency in 2003.

On May 12, 2008, CMS Region I in Boston issued State Agency Regional Bulletin No. 2008-05 reiterating the conclusions reached by Gale Arden's group at CMS in Baltimore. Massachusetts has always allowed transfers without penalty by disabled individuals of any age to a pooled trust that meets the requirements of (d)(4)(C). The change in CMS policy rippled through the Massachusetts elder and disability advocacy community. This author presented arguments to CMS Region I against the mandatory imposition of a transfer penalty on disabled individuals 65+ who fund pooled trusts. Region I policy and legal staff stated in telephone conferences with this author that they found the arguments persuasive. With the hope of prompting a reconsideration of the policy enunciated in the April 14, 2008, CMS memo, Region I forwarded the author's letter on July 16, 2008, to Roy Trudel at CMS in Baltimore for review.

The Chicago Region of CMS followed Boston in July 2008 in mandating its states to begin imposing transfer penalties on disabled individuals 65+ who transfer assets to a pooled trust.

Elder law attorneys throughout the country may want to contact their CMS regional offices or write directly to Herb Kuhn, acting director of the Center for Medicaid State Operations at CMS in Baltimore to advocate against the imposition of a transfer penalty on 65+ transfers to pooled trusts. In states that currently allow disabled individuals 65+ to transfer assets without penalty to pooled trusts, advocates may want to garner the support of state Medicaid agencies that wish to retain their current policies.

Pooled trust administrators should also contact CMS to advocate on behalf of current and future 65+ disabled beneficiaries. They will want to make sure that regardless of future changes to state regulations, current beneficiaries who are 65+ and have not yet applied for Medicaid should not be disqualified for transferring assets to a pooled trust at a time when such transfers were allowed without penalty under state Medicaid law.

It has been 15 years since the passage of OBRA '93. During this period, many states have interpreted federal Medicaid law to allow disabled individuals of *any age*, not only to establish such trusts, but also *to fund them without penalty*. Pooled trusts in many states have signed up beneficiaries based on this interpretation of federal law. CMS should not be pulling the rug out from under our 65+ disabled citizens, least of all when there is no clear legislative mandate to do so.

Susan H. Levin *is a partner in the Newton, Mass., law firm of Rosenberg, Freedman & Goldstein LLP, where she practices elder law. She is also the chair of the Public Policy Committee and long-time board member of the Massachusetts Chapter of the National Academy of Elder Law Attorneys.*

Reprinted with permission from The ElderLaw Report*, Vol. XX, No. 2, September 2008.*

THE FLORIDA BAR
www.FloridaBar.org
Building a Better Practice:
Florida Bar
CLE!
Quality Speakers!
Register Online!
Convenient Locations!
CLE Certification Credit!
Audio CDs/DVDs!
Live Webcasts!
Online 24/7 at Legalspan.com!
Visit **www.FloridaBar.org/cle,** then **"Search Calendar"** to view scheduled courses.

Rainmaking

Word of mouth marketing

by Mark Powers and Shawn McNalis

With the exception of legal skills and managing your time well, the most important skill in assuring your success is the ability to attract good, paying clients. Without good *(translate: profitable)* clients coming through the door on a regular basis, your law practice cannot survive.

Over the next few months, we will introduce you to a step-by-step process for increasing your client base. The techniques discussed are practical and have been time tested in the real world. When you see a tip that you like—try it on! We also recommend the suggested exercises at the end of each lesson, and if you work them throughout the series, you will see the real benefits. Most of the suggested exercises are brief. In order to complete them, block out time on your calendar, and then honor that appointment with yourself.

Rainmaking lesson one

If you review the key elements involved in word-of-mouth marketing, it will come as no surprise that most of the elements involve communication and building relationships. And quite honestly, these are areas where most attorneys excel. Word-of-mouth marketing means just that—get the word out to others about you and your practice. Successful marketing often comes down to knowing *who to talk to, what to say* and *how and when to say it*. Many attorneys fail to market themselves because they miss one of these steps.

To start, focus first on the *who to talk to*. Think about your practice for a minute—who do you need to talk to in order to generate more business? Your clients? Your friends? Your business associates? Not knowing the answer to this question has stopped many good attorneys from making their first marketing efforts, yet it is not a difficult question to answer.

It all begins with a profile of your clients. Until you truly know the clientele you serve, you won't know who influences them to do business with you. If, for example, you are an estate-planning attorney, you may prefer to work with high net worth individuals who own their own businesses. These individuals typically have strong relationships with their CPA's, their financial advisors and their investment brokers. If you happen to have good relationships with these professionals, they would be in a position to recommend your services. They would be referral sources, or influencers, because of their ability to influence clients to use your services.

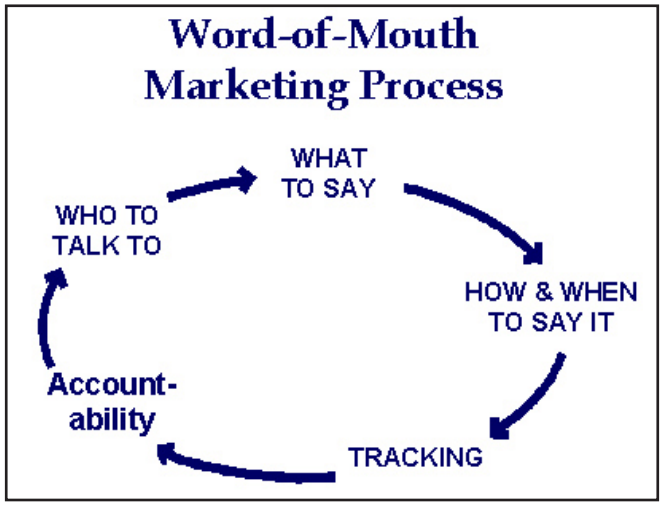
Who is your ideal client?

If you understand the profile, otherwise known as the demographics, of your ideal clients, you can work backward, as just demonstrated, to determine who influences them.

It is important to note that you will have a different primary client or "target market" for each of your practice areas. In addition, some attorneys, real estate attorneys for example, may have institutional clients that send them work, such as banks. If this is the case, consider the characteristics of the target institutions as well as the characteristics of the decision-makers inside the institutions.

But let's take this one step further. When you start examining the characteristics of your clientele, you will begin to notice that not all clients are equally desirable. Some pay their bills promptly while some don't pay at all. Some clients respect your advice and even recommend you to others while others are uncooperative and require an extraordinary level of maintenance.

Think about it. Don't you have both good clients and "problem clients"? This occurs in all practice areas, and the inability to distinguish between the two carries with it a high, hidden cost, but more about that later. As an important part of your personal marketing program, you must sharpen your ability to identify the "good" clients. To help you do that, complete the actions outlined in "The first step" below. Don't be deceived by how simple this exercise looks—the profiles of the individuals and the institutions you serve are the foundation of your word of-mouth campaign.



The first step

1. Make a list of all your current clients. Rank them with an "A," "B," "C" or "D" rating.

2. Use the list of attributes provided below to help you identify the client characteristics for each of your practice areas.

In doing this exercise, many of Atticus's clients are surprised to discover that most of the information about their client demographics is easily retrieved from memory. But if

continued, next page

Meet Arlee J. Colman, program administrator

Arlee J. Colman is the program administrator for The Florida Bar Elder Law Section. She has worked at the Bar for the last 12 years. Arlee works in Tallahassee coordinating the section's events and then travels around the state to each event. She is available to answer questions from members about any aspect of the section. She can be reached at 850/561-5625 or *acolman@flabar.org,* or if you want to talk to her in person, look for her at the next section event.

Word of mouth
from preceding page

you want more precision, go through your files to look at the information you have collected on your clients through the last 90 days.

Practice area: _____
Client attributes _____
Age or range: _____
Income: _____
Occupation:_____
Value of home: _____
Asset value: _____
Family size:_____
Size of business: _____
Where they live: _____
Where they work: _____
Title:_____
Gender: _____
Education level:_____

It is a good idea to cut out this article and this exercise and begin a rainmaking workbook for yourself. In the next issue, we'll discuss how to profit by focusing on your "A" and "B" clients. Most attorneys find this an eye-opening experience—we think you will, too!

***Mark Powers**, president of Atticus Inc., and Shawn McNalis co-authored* The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioner *and are featured writers for* Lawyers, USA *and a number of other publications. To learn more about the work that Atticus does with attorneys or the Atticus Rainmakers™ program, visit* www.atticusonline.com *or call 352/383-0490 or 888/644-0022.*

PROVE YOU'RE AN EXPERT

Are you ready for the challenge?

Board Certification Applications Due

Submit applications July 1 - October 31

Antitrust & Trade Regulation
Business Litigation
City, County & Local Government
Construction Law
Criminal Appellate
Criminal Trial
Health Law
Intellectual Property
Real Estate
State/Federal Government and Administrative Practice
Wills, Trusts & Estates
Workers' Compensation

THE FLORIDA BAR BOARD CERTIFIED SM

Board certified lawyers are legal experts dedicated to professional excellence.

Forms and more information online

FloridaBar.org/certification

Summary of selected caselaw

by Nicholas J. Weilhammer

***Ellison v. State of Florida*, 983 So. 2d 1205 (Fla. 2d D.C.A. 2008).**

Alleged victim was elderly and evaluated pursuant to the Baker Act, but was found competent and released to a nursing home. The alleged victim then moved in with appellant, a longtime acquaintance, who took possession of his cash held by the nursing home, closed his existing accounts and opened new accounts, and obtained money from his accounts. Appellant also made purchases and withdrawals using the victim's debit card, and caused him to transfer his interest in property to joint tenancy with herself. Appellant was convicted of exploitation of an elderly person.

The appellate court held the state failed to prove the appellant deceived the man with the intent to deprive him of his property. The uncontradicted testimony was that appellant used the withdrawn money for his benefit, including materials for the improvements to the alleged victim's home. The purported motive in closing the accounts of the alleged victim was because he believed his daughter was mishandling his financial affairs. There was no evidence of deception in the attempted sale of property, and the evidence suggested the alleged victim was a willing participant in the efforts to transfer ownership of the property to the appellant.

Legal counsel retained to convey property to the appellant testified the alleged victim was alert and responsive during their meetings, the appellant was not present when these documents were signed, no guardianship proceedings had been instituted against the alleged victim and he saw no evidence of coercion, intimidation or deception between the alleged victim and the appellant. While the state contended that the alleged victim suffered from the infirmities of aging and did not appear capable of making proper financial decisions, it did not charge appellant with violating Section 825.103(1)(b), wherein a person obtains an elderly person's assets when the elderly person lacks capacity to consent. Appellant was entitled to a motion for judgment of acquittal. Reversed.

***Reid v. Temple Judea and Hebrew Union College Jewish Institute of Religion*, 2008 Fla. App. LEXIS 8455 (Fla. 3d D.C.A. June 11, 2008).**

Settlor executed a trust, and appellant was later named sole successor trustee. The trust was funded by assets pouring over from decedent's estate, and provided for a number of gifts after his death, including monies to charities, endowment gifts to appellee, specific gifts, personal property and an apartment. Decedent died, and trust funds were insufficient to fund the gifts. Trustee petitioned to reform the trust due to mistake since the trust did not evidence the settlor's intent, which was allegedly to give his apartment to the trustee free of abatement. Certain beneficiaries moved to dismiss, arguing trustee lacked standing.

The court held that equity will reform an agreement so as to conform to the intent of the parties, when an agreement, which due to a mistake of the drafter, violates or fails to carry out the intention of the parties. Relief is given where, through a mistake of the scrivener, the instrument contains an error or fails to properly define the terms agreed to by the parties. A trustee is generally obligated to follow the settlor's true intent and purposes in discharging his or her duties in managing the trust. As an indispensable party in all proceedings affecting the estate, a trustee clearly has standing to seek reformation, which is also supported by portions of the Probate Code existing at the time Reid's claim was dismissed as well as by more recent amendments. Florida law has long recognized a trustee's standing to seek modification of a trust instrument. While recent amendments to the Florida Probate Code took effect after the petition, the trust expressly gave the trustee powers "now or hereafter provided by law." The order dismissing trustee's reformation action was reversed and remanded.

***Bohannon v. Shands Teaching Hospital and Clinics*, 983 So. 2d 717 (Fla. 1st D.C.A. 2008).**

Family of decedent filed suit when decedent entered the hospital for transplant surgery, was improperly intubated and as a result, went into a persistent vegetative state and died when the family terminated life support. Family's complaint alleged the decedent was a "vulnerable adult," and hospital's actions constituted abuse under Chapter 415. The trial court held that the lawsuit was a medical malpractice case, not a case involving a vulnerable person and a caregiver, and dismissed it.

The appellate court held that under some circumstances, acute care hospitals might become "caregivers" of "vulnerable adults" under the act. While the hospital arguably became a "caregiver" under Chapter 415 when the decedent became comatose, appellants did not accuse the hospital of "abuse" or "neglect" while decedent was in a persistent vegetative state. Chapter 415 was not intended to provide an alternate cause of action for medical negligence. The complaint's allegations were mostly conclusions tracking the language of the statutory definitions, unsupported by facts, and were legally insufficient to state a cause of action under Chapter 415. Dismissal affirmed.

***Ehrlich v. Severson*, 2008 Fla. App. LEXIS 9428, (Fla. 4th D.C.A. June 25, 2008).**

Alleged incapacitated person (AIP) was subject of a guardianship petition, which was denied. AIP appeals an order requiring her to pay the fees of the examining committee.

The court held the procedural statute for determining incapacity does not make the potential ward responsible for examining committee fees where the guardianship petition is dismissed or denied. The subject stat-

continued, next page

ute formerly provided for examining committee fees to be paid from the general fund of the county in which the petition was filed, but the 1996 amendment to the statute appears to have eliminated the county's liability except in cases where the ward is indigent, leaving a gap in responsibility for payment of the fees where a good faith petition is denied or dismissed. The Legislature needs to specify who pays the examining committee's fees in this circumstance. Reversed.

***Scheible v. Joseph Morse Geriatric Center*, 2008 Fla. App. LEXIS 11606 (Fla. 4th D.C.A. Jul. 30, 2008).**

The decedent was admitted to the nursing home at the age of 89 with diagnosis of senile dementia and a seizure disorder. Nursing home was presented with a living will/advance directive that stated there were to be no life-prolonging treatments or resuscitative measures taken if she had a terminal condition or was in the process of dying. Nursing home later found the decedent in her bed, unresponsive but breathing. Staff could not obtain her vitals and called 911. EMS intubated the decedent, administered medication and took her to the hospital. During transport, decedent was placed in physical restraints. She was later extubated and died several days later of cardiopulmonary arrest. Appellant sued nursing home for breach of contract, alleging the living will/advance directive was incorporated into the contract between the nursing home and the decedent for her care. Jury awarded damages for the breach of contract claim. Appellant requested that the court attach prejudgment interest to the verdict from the date of loss, which was denied.

The appellate court held the immediate wrong suffered was akin to wrongful prolongation of life. Prejudgment interest depended on the nature of the damages claimed. Thus, the fact that the estate recovered under a breach of contract theory should not automatically entitle it to prejudgment interest if the nature of damages (here, unliquidated personal injury damages) was not the loss of a vested property right. Finders of fact should not engage in such determinations, such as "to weigh the value of impaired life against the value of nonexistence." Affirmed.

Fair Hearings Reported

by Nicholas J. Weilhammer

***Petitioner v. Florida Department of Children & Families*, Appeal No. 07N-00166 (Redacted District and Unit, Dec. 11, 2007).**

Nursing home sought to transfer petitioner because petitioner's needs could not be met in the facility. Petitioner is allegedly noncompliant with rules, verbally abusive, using racial and critical remarks and making threatening comments to staff, and noncompliant with care plan directives derived at various care plan meetings from 2004 to September 2007. DCF determined it was best to transfer petitioner to another facility.

The resident has the right to refuse medication and treatment unless otherwise indicated by the resident's physician. However, the facility must continue to provide other services the resident agrees to in accordance with the resident's care plan. The resident has become difficult. She has approved certain treatments and then reneged on allowing the facility the opportunity to provide them. Thus the facility is unable to honor its obligations to the petitioner. The resident refuses care by allowing only a certain few staff members to care for her, making it difficult for the facility to meet her needs. By refusing appropriate and timely care, the petitioner has failed to meet her obligations. Appeal denied.

***Petitioner v. Florida Department of Children & Families*, Appeal No. 07N-00174 (Redacted District and Unit, Dec. 11, 2007).**

The facility has certain restrictions concerning alcohol use on the premises and possession of lighter fluids. Petitioner apparently had a drinking problem, and the facility made an attempt for the petitioner to go through detoxification programs. Petitioner was drinking high content alcohol mouthwash and was verbally abusive when alleged to be intoxicated. Petitioner had ventured to establishments that serve alcohol, one of which was located across a busy street.

Petitioner was notified in September 2007 that he was to be discharged in October 2007. The discharge notice was not signed by a physician. The discharge notice issued to petitioner stated his needs could not be met at the facility, and the safety of other individuals in the facility was endangered due partly to the petitioner having lighter fluid and being intoxicated. Petitioner argued he was not a threat to staff or patients, but argued that he is an advocate for other patients, and the administration just wants him discharged.

Respondent provided testimony and evidence to support the discharge reasons, but did not provide any clinical records from any physician per federal guidelines. Appeal granted.

***Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-06291 (Dist. 12 Volusia, Unit 88209, Dec. 12, 2007).**

Petitioner was receiving ICP. DCF requested information on petitioner's accounts. Petitioner did not return the requested information to the satisfaction of DCF by the due date, and ICP benefits were terminated Oct. 31, 2006. Notice was sent to petitioner's daughter and the nursing home.

Petitioner applied for ICP, requesting retroactive ICP and Medicaid benefits for October through Decem-

ber 2006. Additional information was requested in January 2007.

Petitioner's representative believes she delivered some of the requested information, but DCF had no record of the information. Petitioner went to live with his ex-wife in January 2007 until he was admitted into another nursing facility. In March 2007, DCF denied petitioner's ICP application for the month of March 2007 only. Petitioner's representative believed she verbally requested a hearing shortly after the denial of ICP benefits in March 2007.

In May 2007, petitioner applied for ICP benefits again to receive retroactive benefits for January 2007 and November and December 2006. DCF had record of a hearing requested in June 2007, then again in August and September. In July 2007, petitioner was approved for benefits beginning February 2007 when he was not in a facility. Petitioner's representative believes she provided all information available and asked for a hearing in a timely manner, including when one of the applications was pending.

The hearing was requested beyond the 90-day timeframe. Therefore, the hearing officer had no jurisdiction over the Oct. 31, 2006, termination action or the March 2007 denial action. However, the hearing officer found petitioner's eligibility for the retroactive months had not been determined for November and December 2006. In the absence of notice, DCF is to determine eligibility for these two months. DCF had to submit all hearing requests to the State Hearing Section within three days of the written or oral request. The hearing was requested in June 2007, but the hearing officer did not receive the request until October 2007. DCF is to timely submit all hearing requests. Appeal granted in part.

***Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-05853 (Dist. 10 Broward, Unit 881399, Dec. 17, 2007).**

DCF determined the patient responsibility to be over $3,506.87, to be paid to the nursing home. Included in the maintenance needs allowance budget is $2,893.83 shelter costs, minus 30 percent of the MMMIA ($514), equaling an excess shelter cost amount of $2,379.83. Added to this is the MMMIA of $1,712, equaling $4,091.83.

The community spouse's gross monthly earned income exceeds the allowable shelter deduction of $4,384.62; therefore, the community spouse income allowance is zero. Petitioner receives a total gross monthly income of $3,541.87. Petitioner requests a financial hardship in considering the patient responsibility amount, claiming that when the nursing home takes his monthly net income, there is a $190.87 monthly shortfall, in addition to what he owes the nursing home from when he was there prior to qualifying for ICP benefits. Petitioner requests consideration of the community spouse's expenses in the determination of patient responsibility, including the mortgage, utilities, HOA fees, car expenses, groceries, clothing, laundry, funeral home expenses and other debt.

The patient responsibility reflects the budgeting methodology set forth in the Fla. Admin. Code. A couple is allowed to prove existence of exceptional circumstances that result in significant inadequacy of the income allowance to meet their needs. The intent of the ICP program is confined to address an individual's basic needs of food, shelter and medical costs. The petitioner's gross monthly income was correctly included in the personal responsibility budget. Affirmed.

***Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-05949 (Dist. 11 Dade, Unit 66251, Dec. 17, 2007).**

DCF advised the petitioner, who resided in nursing home, of the need to set up an income trust for the petitioner in March 2007. Petitioner filed an application for ICP benefits in April 2007, but was denied based upon failure to follow through in establishing eligibility. Petitioner properly funded an income trust in July 2007. Petitioner filed an application for benefits in August 2007. Petitioner was determined eligible for ICP benefits starting July 2007. DCF denied ICP benefits for the retroactive months of February 2007 through June 2007 based on excess income.

Petitioner's representative argued DCF did not advise the petitioner that an income trust had to be set up and funded before ICP could be approved, and that it was a small facility with few Medicaid beds and would take a financial hit for the months Medicaid did not pay for the petitioner's stay. DCF argued it told a staff person in at least March 2007 of the need for an income trust. Affirmed based on excess income and based on the income trust not being established and funded prior to July 2007.

Call for papers — *Florida Bar Journal*

Babette Bach is the contact person for publications for the Executive Council of the Elder Law Section. Please email Babette at *bsbette@sarasotaelder.com* for information on submitting elder law articles to *The Florida Bar Journal* for 2008. A summary of the requirements follows:

- Articles submitted for possible publication should be typed on 8 & 1/2 by 11 inch paper, double-spaced with one-inch margins. Only completed articles will be considered (no outlines or abstracts).
- Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the article. Excessive endnotes are discouraged.
- Lead articles may not be longer than 12 pages, including endnotes.
- Review is usually completed in six weeks.

FAIR HEARINGS REPORTED

The Elder Law Section is making available by subscription copies of the reported fair hearings regarding ICP Medicaid. Also included in the packet are policy clarification correspondence copied to the Elder Law Section from the Department of Children and Families.

The reports are emailed on a monthly basis and posted on the section's website at *eldersection.org.* It takes approximately 30 to 60 days after the month's end to receive the opinions, so mailings will typically be several months behind.

ANNUAL SUBSCRIPTION: $150

****

Fair Hearings Reported
ORDER FORM

NAME: _____ Bar #: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

EMAIL ADDRESS: _____

PHONE: (_____) _____

METHOD OF PAYMENT:

❑ Check (in the amount of $150) payable to: "The Florida Bar Elder Law Section"

❑ Master Card ❑ VISA

Card No.: _____ Expires: ____/_____

Name of Cardholder: _____

Signature: _____

Fax to: 850/561-5825.
Mail to: The Florida Bar Elder Law Section, 651 East Jefferson Street, Tallahassee, FL 32399-2300

ED007

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43